(1)

91-847

NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DONNIE WEIL AND KIM WEIL, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR DAUGHTER, DAY WEIL,

Petitioners,

versus

THE BOARD OF ELEMENTARY AND SECONDARY EDUCATION AND THE OUACHITA PARISH SCHOOL BOARD,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Does the decision of the Fifth Circuit herein contravene previous decisions of both the Fifth Circuit and the Fourth Circuit?

2. Did the educational program provided to Day Weil in the Fall semester of 1985 constitute a free appropriate public education?

3. Is the failure by a school board to provide the procedural safeguards mandated by 20 U.S.C. 1401 et seq. actionable as a denial of a free appropriate public education?

4. Did Congress intend to do away with the Eleventh Amendment defense in cases brought under 20 U.S.C. 1415 (e)(4)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL AND STATUTORY PROVISIONS

REGULATIONS

The constitutional and statutory provisions as well as the regulations set forth above are quoted in more specifics and attached as Appendix F.

OPINIONS BELOW

The opinion of Independent Hearing officer in the due process hearing is attached hereto as Appendix A. The opinion of the Review Panel of the Board of Elementary and Secondary Education is attached hereto as Appendix B. The opinion of the United States District Court for the Middle District of Louisiana is attached hereto as Appendix C. The opinion of the United States District Court for the Western District of Louisiana is attached hereto as Exhibit D. The opinion of the Fifth Circuit Court of Appeal is attached hereto as Appendix E. It is anticipated that the Fifth Circuit Court of Appeal's opinion will be reported officially in the near future. It is not yet published.

CONCISE STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction herein pursuant to the provisions of 28 U.S.C. 1254.

The date of entry of the Fifth Circuit Court of Appeal decree herein is May 28, 1991. No application for a rehearing was made by any party.

Under Rule 13 of this Honorable Court's rules, this petition for certiorari is filed timely.

STATEMENT OF THE CASE

This application for a Writ of Certiorari to issue to the Fifth Circuit Court of Appeal is filed by the parents of Day Weil, a minor, who is also a handicapped child within the meaning of that term under the provisions of the Education of the Handicapped Act. (20 U.S.C. Sec. 1401 et seq.) Jurisdiction in this Honorable Court is vested under 28 U.S.C. Sec. 1254. Jurisdiction in the District Court was vested pursuant to 20 U.S.C. Sec. 1415.

The parties before the Court are the petitioners, Donnie and Kim Weil, parents of Day Weil. The Board of Elementary and Secondary Education, an agency of the State of Louisiana, and the Ouachita Parish School Board in Louisiana.

Day Weil was enrolled in the G. B. Cooley School in April of 1985. G. B. Cooley School provided services to Day

Weil under a contract with the Ouachita Parish School Board. In May of 1985, an Individual Education Program (I.E.P.) was executed between the personnel at G. B. Cooley School and the parents of Day Weil. That I.E.P. governed Day Weil's education through the summer school session. In August of 1985, Donnie Weil called the Ouachita Parish School Board to find out where Day would be going to school in the Fall semester of 1985. He was informed she would be in a self-contained classroom for mentally retarded students on a regular campus. The regular campus was Kiroli Elementary School in West Monroe, Louisiana. This school was a school site under the jurisdiction of the Ouachita Parish School Board. It is the Weils contention that Day Weil was denied a free appropriate public education in the Fall semester of 1985 at Kiroli School. This

contention was first set forth in a letter to the school board demanding a due process hearing on this issue.

This case began as an administrative proceeding, which is called a due process hearing. At that point in time, the case was between the parents of Day Weil and the Ouachita Parish School Board. The Weils received a favorable decision from the Independent Hearing Officer following a two (2) day hearing. The Ouachita Parish School Board appealed that decision to a three (3) person appeal or review board of The Board of Elementary and Secondary Education. The Review Board reversed the independent hearing officer.

The Weils filed suit in the United States District Court for the Middle District of Louisiana against both the Board of Elementary and Secondary Education and the Ouachita Parish School Board seeking judicial review of the

three person review panel of the Board of Elementary and Secondary Education and reversal of that decision as well as reimbursement of expenses of private education for Day Weil and attorney fees. The Judge of the Middle District granted the Board of Elementary and Secondary Education's Motion to Dismiss based upon the State of Louisiana's immunity to suit under the Eleventh Amendment. Further, he transferred the case against the Ouachita Parish School Board to the United States District Court for the Western District of Louisiana, Monroe Division. Trial on the merits was held in that Court on December 18, 1989. The matter was taken under advisement. The Judge of that Court rendered his decision on May 16, 1990, and signed a judgment on June 3, 1990, dismissing the Weils suit with prejudice. The Weils then filed an appeal with the Fifth Circuit Court of Appeal. That Court rendered its decision

on May 28, 1991, affirming both lower courts. This application for a Writ of Certiorari seeks to demonstrate that the decision of the Fifth Circuit Court of Appeal is clearly erroneous and is in conflict with not only the case law in the Fourth Circuit Court of Appeal, but also prior cases in the Fifth Circuit Court of Appeal as well. The decision of the Fifth Circuit Court of Appeal is also subject to being interpreted as being a retreat of this Court's holding in the Burlington case 471 U.S. 359 as to procedural safeguards of the Education of the Handicapped Act. Additionally, the Fifth Circuit decision fails to meet the standard set forth in the Rowley case 458 U.S. 176 as to what constitutes a free appropriate public education from the standpoint of the substance of the program provided to Day Weil. Lastly, the language of the Education of the Handicapped Act clearly demonstrates that

Congress intended, in unmistakeable language, to override the Eleventh Amendment defense in cases coming under 20 U.S.C. Sec. 1401 et seq. For all of these compelling reasons, this Honorable Court ought to grant this application for a Writ of Certiorari.

ARGUMENT

I.

In this case, prior to the Fall of 1985, Day Weil, the minor handicapped child of Donnie and Kim Weil, was attending school at G. B. Cooley School. This school was providing services to eighty-eight handicapped children who were the responsibility of the Ouachita Parish School Board. Day Weil was one of these eighty-eight children. These services were being provided under contract between G. B. Cooley School and the Ouachita Parish School Board. The G. B. Cooley School is not a school which is under the jurisdiction of the Ouachita Parish School Board. Day Weil was one of sixty-six handicapped children who were transferred at the beginning of the Fall semester of 1985 (in late August) to schools under the jurisdiction of the Ouachita Parish School Board. The school under the jurisdiction of the Ouachita

Parish School Board assigned to Day Weil was the Kiroli School in West Monroe, Louisiana. One of the issues incorrectly decided by both the District Court and the Fifth Circuit Court of Appeal involves the Individual Education Program (I.E.P.) in place for Day Weil. An I.E.P. was confected in May of 1985 (Joint Exhibit One) for Day Weil while she was at G. B. Cooley School. That I.E.P. did not address either occupational therapy or physical therapy. The parents did not object to this at that point because they felt with so little time left in the Spring semester the matter could be addressed in the Fall. The parents kept requesting a new I.E.P. once the Fall semester began at the Kiroli School. The Kiroli School was a regular campus, under the jurisdiction of the Ouachita Parish School Board. The school board's personnel finally meet with the Weils in October to do an

I.E.P., but certain personnel as to the requested therapies weren't present. The matter was postponed until November 7, 1985. On said date, a new I.E.P. was confected. (Joint Exhibit Three) As to occupational and physical therapy, the I.E.P. just authorized testing be done on Day Weil to determine her need for these related services. In Burlington School Committee versus Department of Education 471 U.S. 359, 368 (1985) this Court recognized that the Education of the Handicapped Act emphasizes the participation of the parents in developing a child's education program and in assessing the effectiveness of said program. The Fifth Circuit Court of Appeal also has recognized that the Education of the Handicapped Act mandates that an I.E.P. be designed to meet the personal needs of the child in question. See Crawford versus Pittman 708 F2d 1078 (5th Cir; 1983).

A district court in Ohio addressed the specific issue of a school board failing to devise an appropriate I.E.P. timely prior to the start of the school year in the case of Gillette by and through Gillette versus Fairland Board of Education 725 F. Supp. 343 (S.D. Ohio, 1989). In that case, the school board's proposed I.E.P. was not presented to the parents of a dyslexic child until ten (10) days before school started and did not provide for the maximum amount of mainstreaming. The Court held that the parents were justified in enrolling their child in a private school and were entitled to reimbursement of private tuition. In this present case, the Ouachita Parish School Board did not confect a new I.E.P. which would govern the Fall semester of 1985 until November 7, 1985. That is some seventy-five (75) days after the commencement of the Fall semester. This failure to provide a new

I.E.P. prior to the start of the Fall semester violates both federal and Louisiana law.

The federal regulation on what constitutes a free appropriate public education reads:

> 34 Code of Federal Regulations, Sec. 300.4
>
> Section 300.4 - Free appropriate public education
>
> As used in this part, the term "Free appropriate public education" means special education and related services which:
>
> (a) Are provided at public expense, under public supervision and direction and without charge.
>
> (b) Meet the standard of the state education agency including the requirements of this part.
>
> (c) Include pre-school, elementary school, or secondary school in the state involved, and
>
> (d) Are provided in conformity with an individualized education program which meets the requirements under Section 300.340 - 300.349 of subpart C.

Section 300.342 - when individualized education programs must be in effect

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related service are provided to a child; and

(2) Be implemented as soon as possible following the meetings under Section 300.343.

20 U.S.C. 1414 (a)(5) requires a local education agency, such as Ouachita Parish School Board, in the application filed with the State Educational agency for federal funds, to provide assurance that the local education agency will establish or revise an individual education program for each handicapped child at the beginning of each school year, i.e, in this case in last August, 1985.

In present case prior to the Fall of 1985, Ouachita Parish School Board had contracted with G. B. Cooley School, to provide special education and related services for some of the exceptional children under the jurisdiction of Ouachita Parish School Board. Day Weil entered G. B. Cooley under this arrangement in April of 1985 and in early May of 1985 an individual education program (I.E.P.) was signed by the parents of Day Weil and officials of G. B. Cooley. In August of 1985, Day Weil was assigned to a self-contained special education class at an elementary school (Kiroli) under the auspices of Ouachita Parish School Board.

School began in late August and no new or revised I.E.P. for the Fall semester was in place for Day Weil. Thus, no blue print for Day Weils' education existed at Kiroli in the beginning of the Fall semester of 1985.

Petitioners aver and show that this alone denied Day Weil a free appropriate public education.

The trial judge, in discussing this point, states at page seven (7) of his memorandum ruling and order "... although the Ouachita Parish School Board was under an obligation to have an I.E.P. in effect at the beginning of the Fall semester of 1985, it was not necessary that a new I.E.P. be in effect before the beginning of the semester under the circumstances of this case."

Both the trial Judge and the Court of Appeal are legally wrong on this point. The May, 1985, I.E.P. which the lower Courts credit to Ouachita Parish School Board cannot serve as a substitute for a new or revised I.E.P. at the commencement of the 1985 school year because the May I.E.P. was for education at a school not under the jurisdiction of Ouachita Parish School Board, namely G.

B. Cooley. Additionally, Code of Federal Regulations 300.342 (a) clearly states that after October 1, 1977, and at the beginning of every school year, thereafter, each public agency (Ouachita Parish School Board) shall (mandatory language) have in effect an I.E.P. for each child receiving special education from that agency. The Fall of 1985 was the first time Day Weil received special education services directly from Ouachita Parish School Board. Thus, a new I.E.P. was required. Clause (B) of 300.342 clarifies this point by stating the I.E.P. must be in effect before the public agency provides services directly. This is common sense. You have to have an education blue print to implement before beginning services. Finally, if there were any doubt, 20 U.S.C. 1414 (a)(5) clearly requires a new or revised I.E.P. at the beginning of every school year.

20 U.S.C. 1414 (a) (5) reads:

> "[The state agency should] provide assurances that the local educational agency ... will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year...".

This simply was not done in this case. The trial Judge is manifestly in error and the failure to provide Day Weil a new or revised I.E.P. prior to the start of the 1985 Fall semester, for the new circumstance, violated these stated procedural safeguards.

In the case of Hall by Hall versus Vance City Board of Education 774 F2d 629, 635 (4th Cir; 1985), the Court states:

> "The State Hearing Review officer concluded that the school "has consistently failed to inform the parents of their procedural rights and safeguards". The District Court similarly found that the school failed to inform the Halls of their procedural rights until October, 1981. The District Court found that, in addition to ignoring their "fundamental procedures", defendant had, contrary

> to the mandate of Rowley failed to develop an I.E.P. which met the requirements of 20 U.S.C. 1401 (19). ... under Rowley, these failures to meet the act's procedural requirements are adequate grounds by themselves for holding the school failed to provide James a free appropriate public education before January, 1982."

In Jackson versus Franklin County School Board, 806 F2d 623, 629 (5th Cir; 1986) the Court says: "We agree with the Fourth Circuit in finding that failure to meet the act's procedural requirements are 'adequate grounds by themselves' for holding that the school failed to provide a free appropriate public education as mandated by the act." Louisiana law (R.S.17:1947 and Louisiana regulations 451) require school systems to provide direct services to exceptional children. The regulations in Louisiana (Sec. 441 B) concerning the placement portion of an I.E.P. requires a description of the specific education environment in which a child is to be placed and the reason why it is the least restrictive environment.

No new I.E.P. for the Fall semester was confected until November 7, 1985. Thus, there was no placement portion of an I.E.P. stating why Kiroli School was the least restrictive environment for Day Weil in the Fall semester of 1985.

From all of the above and foregoing, it is clear that Ouachita Parish School Board violated not only federal law , but state law as well by not having an in place new or revising I.E.P. for Day Weil at the beginning of the Fall semester of 1985. Thus, there was really no blue print for Day Weils' education in place and nothing to implement. Such violations of the procedural rules under 20 U.S.C. 1401 et. seq. are alone sufficient to constitute a denial of a free appropriate public education.

II.

The Fifth Circuit Court of Appeal did not specifically address the key issue of whether Day Weil received a free appropriate public education in the Fall semester of 1985 at the Kiroli School under the Rowley Standard. In lieu thereof, the Court adopted by reference the opinion of Judge Donald E. Walter. The Court stated (p. 3876 of opinion):

> "On appeal the Weils raise many of the same issues presented to the two District Courts. We endorse as our own the rulings of the two district courts on all of those issues."

In the case of Teresa Diane P. versus Alief Independent School District 744 F2d 484, 489 (5th Cir; 1984) the Court, at footnote four (4) of said decision, states the Rowley decision deals with the Standard of Review over the substance of a states educational program.

School Board Attorneys are genuinely fond of the Rowley case and often times misunderstand the Court's holding therein. School Board Attorneys often state that Rowley means a handicapped child need only derive some educational benefit from the special education and related services provided in order to receive a free appropriate public education. However, the Rowley Court itself (458 U.S. 202) confined the holding of that case to the specific facts before it, namely, a handicapped child who is deaf, does not need an interpreter in the classroom to receive a free appropriate public education. The child in question was receiving substantial specialized instruction and related services and was performing above average in a regular classroom. Additionally, the Court in Rowley, at footnote 25, stated that they do not hold that every handicapped child who is

advancing from grade to grade is automatically receiving a free appropriate public education.

The specific facts of this case, i.e., did Day Weil receive sufficient support services and personalized instruction to enable her to derive educational benefit therefrom was only specifically addressed by the District Court. Judge Donald E. Walter of the Western District of Louisiana erred in several important areas in his ruling thereon. Day Weil is a non-verbal child and uses signing and communication boards to communicate. (See p. 2 of Judge Walter's opinion). Judge Walter stated that "the evidence showed that she made some progress, and Day learned several signs, although not with complete accuracy." (See p. 13 of Judge Walter's opinion). This statement by Judge Walter is not supported by the evidence. Day Weil's teacher in the Fall semester of

1985, Yolanda Stewart, testified that at the end of the Fall semester of 1985, Day Weil was only doing four (4) of the fifteen (15) signs set forth in the November 7, 1985, I.E.P. [Joint Exhibit Three (3)]. These four signs were being done with only fifty (50%) percent accuracy. Two of the four signs Day Weil was doing were approximations of the real signs. (See Testimony of Yolanda Stewart, Due Process hearing transcript p. 665, lines 1-9).

Additionally, Norma Johnston, speech therapist, who worked with Day Weil from August until November 11, 1985, testified that Day Weil did not learn any new signs while she worked with Day Weil. (Due Process Transcript p. 430). Thus, in the very important area of communication, Day Weil received no real educational benefit from the Fall semester of 1985. Compare and contrast that lack of progress with her progress

at the Institute of Logopedics in Wichita, Kansas from February of 1986 to August of 1986.

Mr. Weil testified in this regard as follows:

"Q. Prior to February of 1986, was Day signing at all?

A. Very, very little.

Q. Do you have any independent recollection of approximately how many signs she may have been doing in February of 1986?

A. Two to four.

Q. In August, when she came home and suprised you?

A. That's correct.

Q. Do you know approximately how many she had been doing?

A. Twenty to thirty."

See (Trial Testimony of Donnie Weil p. 36 Record)

At the beginning of the Fall semester, Mr. Weil had to contact the school board to find out where Day Weil would be going to school. (Trial

testimony of Donnie Weil pp. 14-15 Record). Day Weil and her class met for the first seven (7) to ten (10) days in the school cafeteria in lieu of a real classroom. The class was then moved to the music building at Mr. Weil's urging. Finally, on or about September 14, 1985, the class was moved to a Temporary Building ("T" Building). See (Testimony at trial of Donnie Weil pp. 19-33 Record). The teacher, Yolanda Stewart, did not unbox the materials for the class until the class moved to the "T" Building. She did not attempt to implement the May, 1985 I.E.P. for Day Weil until the class moved into the "T" Building. See (Testimony at Due Process hearing of Yolanda Stewart pp. 589-596, p. 600, pp. 639-646). The Ouachita Parish School Board refused to provide either occupational therapy or physical therapy to Day Weil during the Fall semester of 1985. This was the case even

though the occupational therapist who testified for the school board agreed that Day Weil could have benefited in her educational goals had she received occupational therapy. See (Trial Testimony of Patricia Shoudy pp. 248-249 Record). Further, Ms. Shoudy stated she and the other physical therapist employed by Ouachita Parish School Board were each serving the minimum number of students for the minimum number of hours a week. See (Trial testimony of Patricia Shoudy p. 251 of Record). Mrs. Yolanda Stewart, the teacher, admitted that Day Weil knew only two colors, Red and Black, by the end of the semester and that she (Ms. Stewart) worked on goals, such as buttoning, which she personally felt were futile. See (Testimony of Yolanda Stewart Due Process hearing p. 654).

The picture that emerges from the record of the due process hearing and the trial in District Court is a school set-

ting which fails to provide even the most minimal of education benefit. The picture is that of a school system unprepared to provide direct services to Day Weil as has been mandated by federal law since 1975. These events occur in 1985. We see a simple day care or babysitting operation which Ouachita Parish School Board wants to pass off as providing an educational benefit. The Ouachita Parish School Board failed to provide Day Weil in the Fall semester of 1985 adequate classroom facilities, adequate speech therapy and speech therapy facilities, adequate signing assistance, and completely failed to provide any related services of occupational therapy or physical therapy.

When one applies the Rowley standard to the present factual situation, the Ouachita Parish School Board falls way short of providing Day Weil a free appropriate public education.

No educational benefit was derived by Day Weil in the Fall semester of 1985 at Kiroli School. The substance of the program provided does not meet the Rowley standard, and thus, Ouachita Parish School Board failed to provide Day Weil a free appropriate public education.

III.

The opinion of the Fifth Circuit Court of Appeal in this case presents several very curious conclusions. The Court concedes that the change from the G. B. Cooley School during the time frame from May to August of 1985 to the Kiroli School for the Fall semester in late August, 1985, was an "abrupt change". Further, the Court admits that the parents of Day Weil first became aware of this development when they heard the news on television. (Opinion p. 3876) Mr.

Weil called the School Board to confirm the report - that is how the Weils learned of the transfer.

Mr. Weil testified in this regard as follows:

"Q. All right. Now let's go to the Fall of 1985. What were the circumstances of Day Weil's enrollment at Kiroli School in West Monroe?

A. Prior to that she was, the Ouachita Parish School System had an arrangement with G. B. Cooley of placement of the children at their facility. The decision was made that the, that that no longer could apply. Therefore, the Ouachita Parish School System had to remove the kids from G. B. Cooley and distribute them to their regular school facilities.

Q. How did you learn where Day would be going physically? What campus Day would be going to?

A. If I remember correctly, I called the school board office and either talked to Richard Harris or Kay Kirby, who informed us.

Q. Stop just a moment because I don't know if the Court knows who Kay Kirby is, or who Richard Harris is. Identify the persons that you spoke of.

A. Kay Kirby is Director of Special Education. And I believe at that time Richard Harris was responsible for placement of the children.

Q. Okay. It was either or, you spoke to one or the other?

A. Correct.

Q. You are not sure which?

A. No, Sir.

Q. Okay. And you were, in that telephone conversation, informed where she would go to school?

A. Yes, Sir.

Q. All right. And that was Kiroli School in West Monroe?

A. Correct."

(Trial Testimony of Donnie Weil p. 14 line 13 to end of page, p. 15 lines 1-18)

The Court also admits no written notice of this transfer was given the Weils. (See Court's opinion p. 3876) Notwithstanding these facts and the requirement of written notice in 20 U.S.C. 1415 (b)(1)(c) and 34 C.F.R. Sec. 300.504 cited by the Court, the Court concludes that the School Board did not have to provide notice because Kimberly's (Day Weil) transfer did not constitute a change of educational placement. (Opinion p. 3877)

That conclusion overlooks three (3) important considerations. First, the Louisiana regulations, in enumerating the rights of exceptional children, in Section 505 of said regulations lists under Clause (L) the term full and effective notice.

> Section 505 reads in pertinent part:
>
> Rights of Exceptional Children
>
> Exceptional children (and their parents acting on their behalf) have the following rights:

... (L) To receive full and effective notice of proposed actions as provided in this Part.

Section 502 of the Louisiana regulations defines full and effective notice.

Section 502 of the Louisiana regulations reads as follows:

Full and Effective Notice

Full and effective notice is written notice that fulfills the following criteria:

A. Contains a full explanation of all the procedural safeguards available to the parents, including confidentiality requirements.

B. Describes the proposed (or refused) action, explains the reasons for such action, and describes any options considered and rejected.

C. Describes each evaluation procedure, type of test, record, or report used as a basis for the action and any other relevant factors.

D. Identifies the employee or employees of the school system who may be contacted.

E. Is written in language understandable to the general public and provided in the native language or other mode of communication used by the parent.

F. Is also communicated orally (when necessary) in the native language or other mode of communication so that the parent understands the content of the notice.

It is admitted by the Fifth Circuit panel that this requirement of full and effective notice was not given Day Weil's parents as to the transfer from G. B. Cooley School to Kiroli School. This requirement is different than the right of notice addressed by the Fifth Circuit's opinion under 20 U.S.C. Sec. 1415 (b)(1)(c) and 34 C.F.R. Sec. 300.504 (1990) which entitle exceptional children to due process hearings when a disagreement occurs between the parents and school officials as to educational placement. This right (Sec. 502 of Louisiana Regulations) is in addition to all other rights set forth in federal and Louisiana laws. This right is for <u>any proposed action</u>, not just the areas of identification, evaluation or educational placement as per 20 U.S.C. Sec. 1415

(b)(1)(c), 34 C.F.R. Sec. 300.504 (1990) and Louisiana Regulation Section 509 which reads:

Initiation of Hearings

A. A school system or a parent of an exceptional child or a child suspected of being an exceptional child may initiate a hearing whenever a school system:

1. Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child.

2. Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child.

B. A school system initiates a hearing by providing full and effective notice of its intent to initiate a hearing to the parent and to any affected public or nonpublic school personnel. Full and effective notice of a hearing shall include all of the following:

1. A statement of the date, time, place, and nature of the hearing;

2. A statement of legal authority and jurisdiction under which the hearing is to be held;

3. A reference to the particular sections of the statutes or regulations over which the dispute originated; and

4. A short and clear statement of matters asserted.

C. A parent initiates a hearing by sending a written request to the parish supervisor.

D. A school system shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

1. The parent requests the information.

2. The parent or the school system initiates a hearing under this Section.

(Emphasis Supplied)

Thus, the Court of Appeal misunderstood this issue of notice as well as the issue of educational placement.

Secondly, the G. B. Cooley School was providing services to Day Weil under a contract and in cooperation with the

Ouachita Parish School Board. G. B. Cooley School is not a school site that is under the jurisdiction of the Ouachita Parish School Board. Kiroli School is a school site under the jurisdiction of the Ouachita Parish School Board. This change of educational placement was confected at least in part to allow the Ouachita Parish School Board to meet the least restrictive environment requirements of Louisiana regulation Section 448. Section 448(A) of the Louisiana Regulations reads:

> Least Restrictive Environment Rules (Rules for selection of alternative settings)
>
> A. For each educational placement, the school system shall ensure that:
>
> 1. It is determined at least annually.
>
> 2. It is based on an IEP/ Placement Document.
>
> 3. To the maximal extent appropriate, exceptional children are educated with children who are not exceptional.

4. Special class, separate schooling, or other removal of exceptional children from the regular educational environment occurs only when the nature or severity of the exceptionally, e.g., low incidence sensory handicapping conditions, is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

5. The placement is in the school which the child would attend if not exceptional, unless the IEP/Placement document require some other arrangement.

6. The placement is as close as possible to the child's home, if the placement is not in the school the child would normally attend.

7. In selecting an alternative setting, the school system shall consider any potential harmful effect on the exceptional child or the quality of services needed. No child shall be placed in a setting which violates the maximal pupil/teacher ratio or the three-year chronological age span.

8. The special education program in which each educational placement is made, including day or residential nonpublic schools, meets the standards of the State Board.

> 9. Physical education services (including modification in regular physical education) must be provided to handicapped children in the regular physical education program and may be different from that provided other children only if the child needs adapted physical education according to criteria established in Bulletin 1508.

Clause (D) of Louisiana Regulation 448 states that the Least Restrictive Environment Rules cannot be waived by anyone.

Thus, this change was in fact a change of educational placement. Therefore, had appropriate written notice been given to the Weils, they would have had several options open to them. They could have requested a new I.E.P. (There will be more discussion on this point later in this brief). They could have requested a different educational placement. They could have requested a due process hearing if either of the first two requests were denied.

Finally, the case law has held that denial of the procedural safeguards under the Act is tantamount to a denial of a free appropriate public education. See Jackson versus Franklin County School Board 806 F2d 623, (5th Cir; 1986) and Hall by Hall versus Vance City Board of Education 774 F2d 629 (4th Cir; 1985). In the Circuit Court of Appeal for the District of Columbia, it has been held that where notice is sent to parents, but does not describe options considered by the agency or explain why any such options were rejected, which procedures, tests records or reports were used to base the proposal being made, then parents have not received sufficient written notice. See McKenzie versus Smith 248 app D.C. 387, 1527 (1985).

Here in this present, no written notice whatsoever was ever given the parents of Day Weil. This Honorable Court, in the Town of Burlington versus

Department of Education for Community of Massachusetts case, 471 U.S. 359, 105 S.Ct. 1996, 85 L Ed 2d 385 (1985) affirmed the holding of the First Circuit Court of Appeals that the District Court had framed the procedural inquiry too narrowly and that since the Town had failed to give the parents of a learning disabled child the proper notice of their appeal rights, then the standard delays for appeal did not bar the parents subsequent appeal.

This is simply good common sense. The Court of Appeal below ignored the wisdom of its prior decision in Jackson versus Franklin County School Board 806 F2d 623, 629 (5th Cir; 1986) to wit:

> "Surely parents should, and are expected to, vigilantly oversee their handicapped childs educational progress. However, under the Act the burden rests squarely on the school or agency to safeguard handicapped children's rights by informing parents of those rights."

The Court of Appeal cancelled this statutory right for Day Weil in this specific case. This procedural right is available to all other handicapped children in America. The Court of Appeal was in error in concluding that the transfer from G. B. Cooley School to Kiroli School was not a change of placement. However, the Court went even further and concluded that even if the transfer was in fact a change of educational placement, the failure to comply with the act's notice requirement is not actionable. (See Court's opinion p. 3877). That ruling will be cited by school boards and school districts all over America as authority for the proposition that the procedural requirements of the Education of the Handicapped Act and the regulations thereunder are mere words and do not have to be complied with since the failure to do so is not actionable. The Fifth Circuit opinion

apparently recognized this, because the Court in the opinion stated, "We caution that today's ruling is entirely mandated by the facts of this case and is not to be taken as an invitation or condonation of a failure of public officials to comply with the procedural safeguards prescribed by the EHA and resultant federal and state regulations." (Opinion p. 3878) In other words, Day Weil loses herein when every other child in America who is handicapped would win with this same factual situation.

The decision of the Court of Appeals also reverses the whole philosophy and spirit of the Education of the Handicapped Act. This decision stands out from the prior case law in both the Fifth Circuit and other circuits like a damaged and sore thumb. The Federal District Courts of America have been fairly uniform in defending and assuring the rights of handicapped

children. For example, in the case of Gillette by and through Gillette versus Fairland Board of Education 725 F. Supp. 343 (S.D. Ohio 1989) it was held that based upon this Court's ruling in the Burlington decision that the failure by the parents of a dyslexic student to consult with school officials regarding alternative placement for said student prior to enrolling him in a private school did not deprive the parents of their right for reimbursement of private tuition. That Court reasoned since the school's I.E.P. for said child did not provide for the maximum amount of mainstreaming and was not presented to the parents until ten (10) days before school started, there was not enough time to devise an appropriate I.E.P. before the start of the school year. In this present case, the Fifth Circuit and District Court reached the opposite conclusion as to Day Weil's I.E.P. on a very similar

factual context as that found in Gillette. Furthermore, as noted above federal and Louisiana law both require prior written notice to parents or guardians before the school board can take the action proposed as to Day Weil. (Transfer from G. B. Cooley School to Kiroli School). Thus, since no notice was provided to the Weils, the school board was not in a position to move the child to Kiroli. The Court of Appeal states that if the Weils had received notice of the transfer from G. B. Cooley to Kiroli School nothing substantive could have resulted. (Opinion p. 3878) Again the Court misunderstands both the facts of this case and the law. Factually the Weils complaint as to non-notice is not that they wanted to stay at the G. B. Cooley School. The complaint is that 1) The Weils had to do the school board's job for them, i.e. - discover what school their child would be going to

in the Fall of 1985; and 2) Had to beg, conjole and plead to get a new I.E.P. so that the new school personnel could have a blue print for Day Weil's education in the Fall of 1985. The law, i.e., the act and the regulations, federal and Louisiana, place the procedural safeguards burden on the school boards of America and Louisiana. The Fifth Circuit Court of Appeal agrees that generally that is the case. Except for one. Day Weil. She has had these burdens placed on her by the District Court and Court of Appeal in this case. Those decisions are clearly erroneous. Fairness requires that this Honorable Court grant this Writ of Certiorari. Only then will equal justice under the law be available to Day Weil. Therefore, there are very strong policy reasons to ratify the holdings of Jackson versus Franklin County School Board 806 F2d 623 (5th Cir 1986) and Hall by Hall versus Vance City Board of

Education 774 F2d 629 (4th Cir 1985) that the failure to provide the procedural safeguards of the Education of the Handicapped Act by a local school board or school district is tantamount to a denial of a free appropriate public education.

IV.

The Education of the Handicapped Act has clear language indicating Congress intended to override the Eleventh Amendment defense of the several states.

The statute itself is the best evidence of Congress' intention to override the eleventh amendment defense as to the various states of the Union. For example, 20 U.S.C. Section 1415(a) provides in pertinent part:

> "any state educational agency ... which receives assistance under this subchapter shall establish and maintain procedures ... to assure that handicapped children and their parents or guardians are guaranteed

procedural safeguards with respect to the provision of a free appropriate public education by such agencies ...".

(Emphasis Supplied)

Additionally, 20 U.S.C. 1415 (e)(4) creates jurisdiction in cases coming under the act in federal district courts without regard to the amount in controversy. Since state education agencies (States) are often party defendants in proceedings under the act in federal district courts, could Congress have intended the absurd consequence of giving a right which has an absolute defense (The Eleventh Amendment) attached to said right? The answer, of course, is no.

In a landmark decision discussing the very issue presented herein, David D. versus Dartmouth School Committee 775 F2d 411, 421 (1st Cir; 1985) Cert Denied 106 S. Ct. 1790, the Court stated:

"...We need determine only whether Congress effectively overrode the states' sovereign immunity in enacting the EHA. The applicable principle is clear:

> The Eleventh Amendment is 'necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment', that is, by Congress' power to 'enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment'. Fitzpatrick vs. Bitzer 427 U.S. 445, 456 [96 S.Ct. 2666, 2671, 49 L.Ed.2d 614] (1976).

Atascadero, at _____, 105 S.Ct. at 3145. Whether Congress did so here is the question before us.

We think Congress effectively subjected the states to suit in federal court under the EHA. (Cites omitted.) The basic requirement of Atascadero is that 'Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute ifself'. Id. at _____, 105 S.Ct. at 3148 (footnote omitted). Unlike the RHA, which was the statutue at issue in Atascadero, Congress stated in the preamble of the EHA.

> It is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law.

Pub.L. 94-142, Section 3 (b)(9) codified at 20 U.S.C. Section 1400 (b)(9) (emphasis added); See Smith vs. Robinson, ____ U.S. ____, 104 S.Ct. 3457, 3486, 82 L.Ed.2d 746 (1984). Although the RHA incorporates, and by implication, seeks to promote equal protection values, nowhere in the statute ifself did Congress expressly declare that it was acting to assure equal protection of the law; it was for this reason that the RHA 'fell far short' of the mark needed to abrogate states' sovereign immunity.

In addition to this 'unmistakeable' statutory language, and again in contrast to the RHA, the Supreme Court has already extensively discussed the EHA's grounding on the Equal Protection Clause. In Smith vs. Robinson, ____ U.S. ____, 104 S.Ct. 3457, 82 L.Ed.2d 746, the Supreme Court affirmed this court's holding that the EHA was the exclusive scheme for vindicating handicapped children's rights to a 'free appropriate public education as guaranteed by the Equal Protection Clause...."

Cases which are in accord with the rationale of David D. vs. Dartmouth School Committee are:

Kerr Center Parents Ass'n vs. Charles 581 F.Supp 166 (D.C. Oregon; 1983)

Parks vs. Pavkovic 753 F.2d 1397, 1407 (7th Cir.; 1985) and

Additionally, this Honorable Court in Hendrick Hudson District Board of Education versus Rowley 458 U.S. 176, 205 (1982) stated that the importance Congress attached to the Education of Handicapped Act procedural safeguards cannot be gainsaid.

Applying all of the above and foregoing to this present factual case clearly shows both the Fifth Circuit Court of Appeal and the District Court were in error in concluding that the Eleventh Amendment prohibited suit herein against the Board of Elementary and Secondary Education, which board is an agency of the State of Louisiana.

The clear and unequivocal intent of Congress was to alrogate the Eleventh Amendment defenses in cases brought by

parents or guardians on behalf of handicapped children under 20 U.S.C. 1415(e)(4).

CONCLUSION

Petitioners believe that they have clearly shown that a denial of their application herein for a Writ of Certiorari to the Fifth Circuit Court of Appeal would result in the failure to provide fair play and substantial justice to Day Weil. The Ouachita Parish School Board denied Day Weil a free appropriate education in the Fall semester of 1985 both procedurally and via lack of a substantial program. The Institute of Logopedics, the private school in Wichita, Kansas, provided Day Weil an excellent education program. Thus, the requirements of the Burlington decision have been met by the Weils in these

premises. They are, thus, entitled to reimbursement for the private cost of Day Weil's education.

Lastly, petitioners have further shown that the language of the Education of the Handicapped Act authorizes suits against the several states notwithstanding the language of the Eleventh Amendment. This authorization by Congress is clear and unmistakeable.

For all of the above and foregoing reasons, this Honorable Court should grant petitioners request for a Writ of Certiorari to issue to the Fifth Circuit Court of Appeal.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari and accompanying Appendix have been mailed, postage prepaid, via First Class mail, to each of the counsel for all other parties as follows, to wit:

1. Mr. David E. Verlander III, P.C
   MCLEOD, SWEARINGEN, VERLANDER, DOLLAR, PRICE & NOAH
   P.O. Box 2350
   1900 North 18th Street
   Monroe, LA 71207-2350

2. Mr. William J. Guste, Jr., Attorney General, Department of Justice, Attn: Mr. Michael S. Hebert, P.O. Box 94005, Baton Rouge, Louisiana 70806-9005.

Witness my signature at Baton Rouge, Louisiana on this 24th day of August, 1991.

Leo J. Berggreen

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APPENDIX

APPENDIX

APPENDIX A

IN RE: DAY WEIL

DUE PROCESS HEARING

WITH OUACHITA PARISH SCHOOL BOARD

REASONS FOR DECISION AND HEARING DECISION

PRE-HEARING SUMMARY

These proceedings were provoked by Mr. and Mrs. Donnie Weil, parents of Kimberly Day Weil, by letter addressed to Ms. Kay Kirby, Director, Special Education Services, Ouachita Parish School Board, dated September 30, 1986. Following selection of the undersigned as the impartial hearing officer herein; communication by and between the undersigned and counsel for Mr. & Mrs. Weil; and the Ouachita Parish School Board; and a waiver of hearing delay, by both parties, as otherwise required by La. R. S. 17:1941 et seq, a due process hearing was held at the Ouachita Parish School Board Office on January 21 and 22,

1987. As a result of such prior communication, certain stipulations of facts concerning Day were entered into, as follows:

1. That school personnel and the parents approved an individual education plan for the child on November 7, 1985;

2. That the child was removed from the public school system by the unilateral action of her parents in February, 1986;

3. The pupil was attending Kiroli Elementary School, which is a public, non-residential school in West Monroe, Louisiana, prior to her enrollment, in approximately February, 1986, in a private residential facility in Kansas;

4. Kimberly Day Weil is eligible for special education; the parents did not request a change in the November 7, 1985 IEP before moving the pupil to the Kansas facility, and the parents did not request a change in placement of the pupil prior to moving her out of the Ouachita Parish School system.

An open hearing then ensued in accordance with prior agreement of counsel to the effect that all issues pertinent should be considered as having been placed before the hearing officer; in general, it was understood that, to

the extent possible, all issues should be resolved by the hearing officer in an effort to avoid piece-meal resolution of the matter.

The facts presented herein were many faceted and voluminous. The issues tend to go to the heart of the Education for All Handicapped Children Act (the Act) and the interpretations of same. This, and the expectation of a review/appeal of this decision, has led the undersigned to endeavor to explain as specifically as possible any holding; any lack of specificity should be viewed as an indication that the undersigned did not consider such factor pertinent and/or persuasive. In addition, due to the fact that numerous decisions have been cited which may be subject to disagreement as to their applicability to the instant cause, I have tried to follow the foremat utilized in Burlington, infra, 736 F.2d 773 (1984) in structuring this decision,

and first include a jurisprudential overview as to the cases to which I will refer. Before beginning, I am compelled to plagiarize the language from Burlington, referred to supra, at p. 802: (The Act) is, to put it mildly, a difficult act to interpret and effectuate. Congress has combined elements of a number of different statutory schemes and visited on the (hearing officer) the task of making them mesh. (I) have done (my) best to follow the intent and purpose of the act to insure "a free appropriate public education" for (Day), but the task has not been easy.

JURISPRUDENTIAL OVERVIEW

Burlington v. Dept. of Education 736 F. 2d 773 (1984)

1. While compliance with the minimum standard set out by the Federal Act is mandatory for the receipt of Federal

financial assistance, the act does not presume to impose, nationally, a uniform approach to the education of children with any given disability; it requires only that a "free appropriate education", in conformity with the State's educational standards, be provided to each disabled child upon individualized evaluation and planning. "Cooperative Federalism" in this context, then, allows some substantive differentiation among the States in the determination of which educational theories, practices, and approaches will be utilized for educating disable children with a given impairment. p. 784.

2. The ultimate question for a Court under the act is whether a proposed IEP is adequate and appropriate for a particular child at a given point and time. p. 788

3. ... "Special education" means specially designed instruction ... to meet the unique needs of a handicapped child. Sec. 1401(18), which specifies the formal requirements of a "free appropriate public education" (FAPE), requires that all of the child's special needs must be addressed in the educational plan. The objective of the Federal floor, then, is the achievement of effective result - demonstrable improvement in the education and personal skills identified as special needs - as a consequence of implementing the proposed IEP.

4. Reimbursement is an available remedy to a prevailing party as a matter of equitable relief, committed to the sound discretion of the district Court (hearing officer). ... Where reimbursement is an issue; whether to order reimbursement,

and at what amount, is a question determined by balancing the equities. p. 801.

Burlington v. Dept. of Education 85 L. Ed. 2d. 385 (1985)

1. While we doubt that this provision (Sec. 1415(e)(3)) would authorize a Court to order parents to leave their child in a particular placement, we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of State or local school officials, do so at their own financial risk. If the Courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated Sec. 1415(e)(3). p. 387

2. Court approves determining reimbursement in accordance with equitable considerations. p. 398

Hall v. Vance City Bd. of Ed. 774 F. 2d 629 (1985)

1. Rowley recognized that no single substantive standard can describe how much educational benefit is sufficient to satisfy the act. Instead, the Supreme Court left that matter to the Courts for case by case determination. In approaching this question, the District Court adopted the Rowley Court strategy. It considered James' capabilities and intellectual progress and what the school had provided him. p. 635

2. Although the Rowley Court considered Amy Rowley's promotions in determining that she had been afforded a FAPE, the Court limited its analysis to that one case and recognized that promotions were a falable measure of educational benefit. p. 635 and 636

3. Clearly, Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces some minimal academic advancement no matter how trivial. p. 636

Bd. of Ed. v Rowley 73 L. Ed. 2d 690 (1982)

1. (The definition of FAPE) tends toward the cryptic rather than the comprehensive. p. 701

2. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional check list are satisfied, the child is receiving a "free appropriate public education" as defined by the act. p. 701

3. Noticebly absent from the language of the statute is any substantive standard perscribing the level of education to be accorded handicapped children. p.701

4. The theme of the act is "free appropriate public education", a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services. p. 707

5. The "basis floor of opportunity" provided by the act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

6. Insofar as the State is required to provide a handicapped child with a "free appropriate public education", we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. p. 710

HEARING OFFICER'S NOTE:

See p. 709 for a clear indication by the Rowley Court that this decision is one very narrow in scope and is a decision intended to deal with the specific circumstance of a handicapped

child who is hearing impaired, and who was performing above average in the regular classroom of a public school system. Thus, Rowley must be cited with great care. It ultimately specifically holds only that the Act does not require a school system to maximize a child's potential. In Rowley the child was notheld entitled to a sign language interpreter as claimed by her parents.

Alamo Heights v. State Bd. of Ed. 790 F. 2d 1153 (5th Cir. 1986)

1. A severely mentally handicapped child who cannot communicate orally; he was not "educable" but rather is "trainable". p. 1155

2. ... (The IEP) must be formulated to provide some educational benefit to the child in accordance with the unique needs of that child. The same educational benefit standard does not mean that the requirements of the act are satisfied so long as a handicapped child's progress, absent summer services is not brought to a virtual standstill. Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the

handicapped child may be entitled to year round services. The issue is whether the benefits accured to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months. p. 1158

3. The Burlington rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act. p. 1161

4. Factors that the Court may consider in determining whether full or partial reimbursement is in order would include the existance of other, perhaps more suitable, substitute placements, the effort expended ... in securing alternative placements, and the general cooperative or uncooperative position of the school district itself. p. 1161

Scokin v. State of Texas 723 F. 2d 432

Marvin H. v. Austin Independant School Dist. 714 F. 2d 1348 (1983)

HEARING OFFICER'S NOTE:

As acknowledged by the School Board, these decisions were overruled by Burlington. For reasons set forth, infra. I did not find that Mr. & Mrs. Weil are precluded from claiming reimbursement under the unique facts herein. Said another way, I did not find such facts to render Burlington inapplicable, nor was there any other reason to apply the holdings in either Scokin or Marvin H.

FACTUAL CIRCUMSTANCES:

Kimberly Day Weil, hereafter referred to as Day, was born October 3, 1976. At the point and time at issue herein, beginning in May, 1985, Day was approximately 8 1/2 years old. Day is severally mentally handicapped especially in the area of fine motor and cognitive abilities. Her abilities (developmental age) averaged 15 to 20 months. She has a very short attention span and a very low tolerance for frustration. She has a very close, supportive relationship with her parents and is responsive to their

encouragement. A good summation is contained in an educational evaluation performed by the Institute of Logopedics, dated February 13, 1986. This evaluation closely parallels the evaluations performed prior to that time by the Ouachita Parish School Board. The Institute's evaluation was performed at the time that Day was removed from the Ouachita Parish School system by her parents, and that date, that is, February, 1986, marks the end of the time at issue herein; accordingly, the specific time to be evaluated by this decision is from May, 1985 until February, 1986.

Prior to May, 1985, Day had many different educational environments. She entered Columbia State School in Louisiana in March of 1981, which she attended until February, 1983; Columbia State School is a residential facility. In February, 1983, she began to attend

the Institute of Logopedics after the parents rejected a placement at G. B. Cooley, a non-residential facility, located in Monroe, Louisiana (which is also the home and residence of Day's parents). Throughout her life, Day has had a history of seizures, the Lennox Gastaut Syndrome. The severity of this problem increased to such an extent that she had to be removed from the Institute of Logopedics in August of 1983. Day was brought back to the home of her parents, was again placed in the Ouachita Parish School System. She began to attend Riser Elementary School in October, 1983, which she attended until January, 1984. In January, 1984, she was placed at G. B. Cooley, a facility above described. At G. B. Cooley she was assigned to a moderately mentally handicapped class. At that same time, Day's parents hired a private tutor, Day attending G. B. Cooley on a part time basis. This continued

until December, 1984, when Day's home instruction by her tutor began on a full time basis. This continued until the following May, the inception date of the time period at issue in these proceedings. In May, 1985, a re-evaluation of Day was performed. An I.E.P. was prepared after considerable consultation between Mr. and Mrs. Weil and School Board officials, and was agreed to by all parties. After re-entering the Ouachita Parish School system in May, 1985, Day first attended G. B. Cooley. G. B. Cooley was performing special education services for the Ouachita Parish School Board on a contract basis. She received special education services at G. B. Cooley until August, 1985, when the summer session at the school ended. At this time, the School Board, for unspecified reasons, apparently discontinued their contractual arrangement with G. B. Cooley. It was

required, on rather short notice, to create its own facility for special education students. Thus, Day began to attend Kiroli Elementary School, located in West Monroe, Louisiana, in September, 1985. On November 7, 1985, a new I.E.P. was formulated, was agreed to and signed by all parties.

In February, 1986, Day's parents unilaterally withdrew her from the Ouachita Parish School System and enrolled her in the Institute of Logopedics, a residential facility, located in Wichita, Kansas.

As alluded to previously, Day's evaluations by the Ouachita Parish School System and the Institute of Logopedics closely coincide. Her maximum progress which might be expected at the end of her free appropriate public education would be advancement to approximately the kindergarten level with the possibility that she will be able to perform very

basis math skills. This is the maximum expectation. Nevertheless, it is apparent that Day is at least trainable, meaning that she should be able to be trained to care for herself, insofar as personal needs such as dressing, toileting and the like.

Day is non-verbal at present; any future ability to verbalize, is most speculative, with the expectation that she will never be verbal. She must communicate using "signing". In signing, certain gestures are utilized to indicate certain needs, wants, etc.; the use of signs to spell words, say, is not comtemplated. Gestures are utilized to indicate specific things such as horse, potty, baby, hot, etc. At the time that Day entered the Institute of Logopedics in February, 1986, she was able to approximate only about 10 signs; it is unclear how many of these signs were used independently by Day in an effort to

affirmatively institute communication with others. It is clear, however, that many of her signs were only approximations, and were imprecise, at best. The major concern of Day's parents was her ability to communicate. This meant teaching the use of signs. To do this would include the ability to physically perform the required gesture; accordingly, certain physical and other therapies were required in order to assist Day to properly manipulate, so as to make the required gestures. As mentioned previously, Day has a very short attention span and has a very low frustation tolerance. She exhibits maladaptive behavior at such times in the form of biting, pinching, and/or a refusal to perform assigned tasks. This behavior was mentioned by Day's teachers while she was at Kiroli as well as by her instructor when she was moved to the Institute.

A thorough review of the Institute's evaluation reports shows slow but steady progress beginning almost immediately after she began attending the Institute. According to the December 19, 1986 I.E.P. review, Day has experienced significant improvement in all areas of emphasis, that is, gross motor, fine motor, cognitive, self-help and personal/social skills. Significant improvement had occured in her communicative skills in that her vocabulary had been approximately tripled since February, 1986. In addition, she was putting together two and three signs to make phrases. A thorough review of this evaluation (Exhibit Weil No. 31) reveals a rather phenomenal degree of educational progress during the approximate nine month period. (Feb. 86 - Dec. 86).

ISSUES TO BE DECIDED:

A. Should Exhibits Weil 23-31 (Institute Reports) be excluded by maintaining the hearsay objection and lack of confrontation objection as to same?

B. Did the Ouachita Parish School Board provide Day with a free appropriate public education from May, 1985 until February, 1986?

C. Can the Ouachita Parish School Board presently provide a free appropriate public education for Day?

D. Should Day's parents be reimbursed expenses and, if so, in what amount?

A. Should Exhibits Weil 23-31 (Institute Reports) be excluded by maintaining the hearsay objection and lack of confrontation objection as to same?

Hearsay evidence is admissible in administrative proceedings in accordance with La. R. S. 49:956(1). The importance and relevence of the evidence contained in said Exhibits is self-evident; the sole concern is prejudice to the School Board due to a lack of confrontation. These Exhibits have been examined carefully; they are objective and appear

to have been prepared at a time which is substantially comtemporanious with the events which they describe. They appear to be completely accurate. To have required the personal appearance of the preparers of such voluminous reports, and other evidence, would not have materially affected the nature or character of the evidence ultimately presented. A review of the reports does not indicate that an inability to cross examine the preparers of same would cause any prejudice to the School Board. Thus, these Exhibits are admitted for the purpose of showing Day's current educational circumstances. Specifically, I have taken the said Exhibits into account in determining the progress that she made from February, 1986 until December, 1986. In addition, I have utilized these Exhibits in assessing whether Day has the capability to be either trained and/or educated.

B. Did the Ouachita Parish School Board provide Day with a free appropriate public education from May, 1985 until February, 1986?

The objective of special education is the achievement of effective results demonstrable improvement in the education and personal skills identified as special needs as a consequence of implementing the I.E.P. No single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. This is to be decided on a case by case basis. One should consider the capability of the student, her intellectual progress, and what the school had provided to the student. There must be an educational benefit from the instruction. Burlington (App), Hall, Rowley, supra.

A review of Day's educational history reveals a number of changes of educational environment. It indicates an aggressive attitude by her parents to provide to their child the best education

that she can get, taking into account her numerous and severe exceptionalities. Her history indicates a series of progressions and regressions. For the severely mentally handicapped child, progress is, at best, difficult and is obtained only with considerable effort; regression occurs quickly and easily. Regression is a factor which may be properly taken into account in determining the services that a handicapped child must be provided under the Act. Alamo Heights, supra.

A determination of this question must properly be in two parts:

1. Is the time increment involved, that is, from May, 1985, until February, 1986, sufficient in order to fairly assess the educational opportunities provided by the School Board?

2. Was there any progress (educational benefit) received by the child?

The time period involved is relatively brief. However, there has been no objection by the School Board as to the brevity of the time period. Undoubtly, this is because the parties were well acquainted with one another in May, 1985, as Day's educational history graphically demonstrates. Moreover, it was patent at the hearing that Mr. and Mrs. Weil, and the School Board, had had sharp differences of opinion for a considerable period of time; the School Board was, or should have been, well aware that Mr. and Mrs. Weil would be rather aggressive in pursuing every benefit to which their daughter was entitled. Thus, the extent of time analyzed, that is, from May, 1985, until February, 1986, becomes a non-factor, being neither for, nor against, either side. Finally, as stated in Burlington (App.), the ultimate question is whether

the I.E.P. is appropriate for a particular child at a given point in time.

This case turns on whether an educational benefit was provided to Day during the period of time in question. As stated in Rowley and Hall, supra, there is no specific standard determining how much educational benefit is a sufficient benefit so as to satisfy the Act. The only thing that is certain is: if a required benefit has been provided, a free appropriate public eduction has been provided; if there is an insufficient educational benefit, a free appropriate public education has not been provided. It is appropriate to equate "educational benefit" to "progress"; if the student does not show progress, then, how could it be said that an educational benefit has been provided? It may be argued that this puts a subjective standard and obligation upon the teacher,

or the school system, to demonstrate progress/achievement by each student, which, in some cases, cannot be obtained, notwithstanding the best efforts of the teacher. Everyone has conduct which is expected of them and an expected level of performance. This is especially the case with professionals, which educators certainly are. Doctors, lawyers, dentists, accountants, etc., all have a required level and/or standard of performance and accomplishment and the necessity of evidence and/or demonstrating of same; it comes with the territory. Educators should not be offended at having a similar level of performance expected of them. In order to place this concept in burden of proof terms, I find that a prima facie case has been established that a free appropriate public education was not provided, upon showing that there was no progress achieved by the child. Under such an

analysis procedure, a school board would then have an opportunity to combat or rebut such a prima facie case.

In the instant case, I can find no progress achieved by Day whatever. If anything, she regressed. As well intentioned as School Board personnel were, and as qualified as they undoubtedly were, the fact still remains that Day, the ultimate sole intended beneficiary of the Act, did not receive any educational benefit during the time in question; if any educational benefit was received, it was woefully insufficient to satisfy the Act. There is no evidence which would justify this circumstance and the prima facie case is not rebutted.

Accordingly, I specifically find and hold that the School Board did not provide Day a free appropriate public education from May, 1985, until February, 1986.

C. Can the Ouachita Parish School Board presently provide a free appropriate public education for Day?

It is apparent that severely mentally handicapped children need stability in their surroundings. They are upset and tend to regress when they are subjected to new surroundings. The evidence strongly suggests that a placement other than the Institute of Logopedics, prior to September, 1987, would be detrimental to Day and would very likely cause regression. Day's progress has been fought for too hard to risk regression without the most cogent of reasons. Such reasons do not exist.

Thus, I specifically hold that the only acceptable placement for Day, until September, 1987, is at the Institute of Lodgopedics, her current placement. This placement shall thereafter continue, until such time as there is an I.E.P. jointly agreed to by and between Mr. and Mrs. Weil and the School Board, providing

for some other placement, or until this decision is overruled and/or amended by proper authority.

D. May Day's parents of be reimbursed expenses and, if so, in what amount?

Prior to deciding the issue of reimbursement, it is necessary to determine two associated issues:

> (a) Did the Weil's forfeit any right to reimbursement from February, 1986, until October, 1986, October, 1986 being the date that a due process hearing was requested by the Weils?
>
> (b) Did the unilateral removal of Day from the Ouachita Parish School system during the existence of an I.E.P. cause them to forfeit reimbursment rights?

From February, 1986, until October, 1986, no proceedings were pending with regards to Day, her placement, etc. Ordinarily, this circumstance would place the matter without the Burlington rule, supra, requiring the imposition of the holdings in Skokin and/or Marvin H., supra; thus, reimbursement for expenses

during this time period would be denied. However, reference to Exhibit Weil No. 2 makes it clear that Mr. Weil did contact the Ouachita Parish School Board in February, 1986, and requested partial reimbursement of his expenses. The response by the School Board, Exhibit Weil No. 2, does not advise the Weils of a right to a due process hearing and/or otherwise advise Mr. and Mrs. Weil of their rights should they disagree with the November 7, 1985 I.E.P. Taking this into account, the fact that the Burlington rule was then "new law", and that the total time at issue is but eight months (from February through September), there is not undue prejudice to the School Board, nor an improper extension of Burlington, in allowing reimbursement for this time period. Moreover, viewing this matter in its present posture, it is apparent that the position of the School

Board would not have changed had a due process hearing been requested earlier than September 30, 1986.

Accordingly, I hold, under the unique facts of this case, that Mr. and Mrs. Weil are not precluded from receiving reimbursement for expenses during the period from February, 1986, through September, 1986.

The unilateral action of Mr. and Mrs. Weil in removing the child from the school system during the existence of an I.E.P. is factually distinguishable from Burlington. In Burlington there was not an agreed I.E.P., and the movement of the child was during the administrative procedures incident to a disputed I.E.P. Alamo Heights, supra, had found the Burlington rule not to be so narrow as to permit reimbursement only when the interim placement chosen by the parents is found to be the exact proper placement required under the Act. The concerns

expressed in Skokin and Marvin H. were that the parents would work within the system; the Burlington Court found that the welfare of the child was paramount to this concern. Financial risk to parents under Burlington, is sufficient to restrict non-substantive unilateral placements. Mr. and Mrs. Weil undertook this financial risk when they unilaterally removed Day from the Ouachita Parish School System. Should Day not have progressed at the Institute, then, and in that event, the School Board would have had a powerful rebuttal argument to any prima facie case. Mr. and Mrs. Weil have certainly tried to work within the system. Their failure to comply with a procedural formality (the fomenting of a due process hearing in February, 1986) held to be is without consequence.

Thus, I specifically hold that the unilateral movement of Day by her parents during the existance of an I.E.P., and without the prior institution of a due process hearing, does not prohibit them from seeking reimbursement.

Ultimately, then, the question is how much reimbursement should Mr. and Mrs. Weil receive. Under Burlington (App.), a balancing of the equities is required. Factors that may be considered in determining whether full or partial reimbursement is in order would include the existence of other, perhaps more suitable, substitute placements, the effort extended in securing alternative placements and the general cooperative or uncooperative position of the School District itself. Alamo Heights, supra. A balancing of the equities in this matter is extremely difficult. The considerable expense of the Institute of Logopedics is not an easy burden for

anyone to bear, be it the Weils or the School Board. The School Board is receiving Federal Funds for special education children. Importantly, it is the entity charged with the primary responsibility of providing Day a free appropriate public education under the Act. I have not been provided with cost data relative to residential facilities that might be available in the State of Louisiana nor has there been evidence presented, by either side, that there are alternative facilities which might offer an acceptable education to Day.

I find both parties to have been unreasonable in their positions in February, 1986. It may well be that no placement other than the Institute would have satisfied Mr. and Mrs. Weil, but, now, any such conclusion has the benefit of hindsight. It is clear that the Weils and the School Board have had considerable difficulty dealing with one

another. Mr. and Mrs. Weil should have exhibited more of a cooperative attitude and spirit in dealing with the School Board in February, 1986. On the other hand, I find the response contained in Exhibit Weil 2 to be grossly inadequate insofar as advising Mr. and Mrs. Weil of their rights under the Act, as well as attempting to generate a cooperative posture on the part of the School Board. I fully recognize that these parties may well have "drawn a line in the dust" by this point and I may expect too much of either party. Nevertheless, I specifically find that both parties were mutually and equally uncooperative with one another. Thus, lack of cooperativeness becomes a non-factor.

Day is receiving scholarship assistance from the Institute. The Weil's insurance pays 80% of therapy costs. Mr. and Mrs. Weil should not be reimbursed such things as party fares and

airplane tickets. The cost of trips to Wichita, Kansas by Mr. and Mrs. Weil, including I.E.P. Conferences, are properly catagorized as visits with Day and should not be reimbursed. The residence charge for Day is $1,725.00 monthly. Should Day live at home, the Weils would incur basic expenses for her housing, transportation, food, etc., (should she not have the benefit of a residence facility). The Weils should not be reimbursed for such basic expenses. I assess the amount of the Weil's basic expenses, for which they should not be reimbursed, at $500.00 per month. Mr. and Mrs. Weil, as of December, 1986, had total expenses of $34,336.05, substracting those amounts for which they should not be reimbursed for airfares, party fares, insurance payments received, comes to $6,967.18, for a total of $27,368.87. This amount would include the Weil's basic expenses

of $500.00, per month, for 11 months, or $5,500.00. As of January 1, 1987, the Weil's should be reimbursed $27,368.87, less $5,500.00 or $21,868.87. Beginning January 1, 1987, the Weil's should be reimbursed expenses according to the same calculation, that is, total expenses of the Institute, less:

1. All scholarships.
2. All insurance proceeds
3. $500.00 per month

I order Mr. and Mrs. Weil to be reimbursed accordingly.

RENDERED AND SIGNED at Lake Providence, Louisiana, this 13th day of April, 1987.

LEO A. MILLER, JR.
Attorney at Law
300 First Street
Lake Providence, LA 71254

Leo A. Miller, Jr.
Impartial Hearing Officer

APPENDIX B

STATE LEVEL REVIEW DECISION

I. TITLE INFORMATION

1. IN RE: DAY WEIL

2. PARTIES

1. Parents of Student: David Doniel "Donnie" Weil and Kimberly Weil

Attorney for Parents:
Leo J. Berggreen

2. Ouachita Parish School Board

Attorney for School Board:
Ellen R. Eade

3. BASIC INFORMATION

The subject of this appeal is Kimberly Day Weil. She was born on October 3, 1976 and has been classified as severe mentally handicapped. The child was attending Kiroli Elementary School, a public, non-residential, school in West Monroe, Louisiana. On November 7, 1985 the school personnel and the parents approved an Individualized Education Program (I.E.P.) for the child. In February, 1986, the parents

unilaterally removed the child from the public school and placed her in The Institute of Logopedics in Wichita, Kansas. The parents did not request a change of placement prior to moving the child from the Ouachita Parish School System. The main issue raised in the hearing are addressed to services and placement. In addition, there were additional issues raised on the introduction of certain evidence and the payment of expenses incurred by the parents of Day Weil.

4. PARTICIPANTS

1. Ellen R. Eade - Attorney for Ouachita Parish School Board

2. Leo J. Berggreen - Attorney for Kimberly Day Weil and Mr. and Mrs. David Doniel Weil

3. Dr. Benjamin Brooks - Director of Child and Adolescent Services Service Director and Director of Education, Parkland Hospital

4. Mary Margaret Mansour - Physical Therapist, Ouachita Parish School Board

5. David Doniel "Donnie" Weil - Father of Kimberly Day Weil

6. Kimberly Weil - Mother of Kimberly Day Weil

7. Norma Johnson - Speech Pathologist, Ouachita Parish School Bd.

8. Kevin Richter - Speech Therapist

9. Patricia "Pati" Navarro-Occupational Therapist, Ouachita Parish School Board

10. Yolanda Stewart - Special Education Teacher, Ouachita Parish School Board

11. Debbie Armstrong - Speech Therapist, Ouachita Parish School Board

12. Laura Gregory Douglas - School Psychologist, Ouachita Parish School Board

13. Evelyn P. Evans - Special Board of Education Teacher, Ouachita Parish School Board

14. Jo Adams - Supervisor of Special Education, Ouachita Parish School Board

15. Kay Kirby - Director of Special Education, Ouachita Parish School Board

16. Cindy Carmer - Sister of David Doniel "Donnie" Weil

II. STATEMENT OF JURISDICTION

The parents invoked a due process hearing. The Ouachita Parish School Board has invoked their right of Appeal under Act 734 Sec 513 et seq. The School Board request a general review of the issues raised at the hearing.

The issues presented at the due process hearing were:

a) Should the exhibits, Weil 23-31 (The Reports of The Institute of Logopedics), be admitted into evidence?

b) Did the Ouachita Parish School Board provide Kimberly Day Weil with a free appropriate public education from May, 1985 until February, 1986?

c) Can the Ouachita Parish School Board presently provide a free appropriate public education for Kimberly Day Weil?

d) Should the parents of Kimberly Day Weil be reimbursed for the expenses occasioned by the transfer to The Institute of Logopedics?

III. SUMMARY OF APPLICABLE LAW & REGULATIONS

The issues raised in this appeal are governed by Louisiana Revised Statutes 17:1941 et seq., Education

Opportunities For Exception Children's Act; Louisiana Department of Education Bulletin 1707 (Regulations for Implementation of the Exceptional Children's Act); Louisiana Department of Education Bulletin 1530 (Louisiana I.E.P. Handbook); United States Code 20:1401 et seq., Education of the Handicapped Act and the various reported cases interpreting said statutes.

IV. FINDING OF FACT

Kimberly Day Weil was born October 3, 1976. Shortly after her birth, at the age of nine months she was diagnosed as being developmentally delayed. Her education program commenced at age two when she was placed in the Strauss Rehabilitation Center in Monroe, Louisiana. She remained in the Strauss Center for two years and ten months. When Day was three years old she entered the pre-school program at Sherrouse

Elementary in the City of Monroe. Her parents were dissatisfied with the City School System so they moved to the Parish to be able to come under the Parish School System. In August of 1980, Day entered the Parish System at Crosley Elementary School. In 1981 pursuant to a recommendation by the supervisor of Special Education, Day was transferred to Columbia State School in Columbia, Louisiana, a residential facility operated by the State. Day remained in the Columbia State School for two years until she was discharged. Upon discharge her parents placed her in the Institute of Logopedics in Wichita, Kansas. Day remained in the Institute of Logopedics until August of 1983, when she began to have severe seizure disorders. In August of 1983, she was hospitalized until September. Upon her release from the hospital she was returned to the Parish School System. She was reevaluated and

placed at Riser Elementary School. Her parents were not satisfied with the placement at Riser. In January, 1984, Day was transferred to G. B. Cooley; G. B. Cooley is a privately owned facility that was under contract with the Parish to service exceptional children. The parents became dissatisfied with G. B. Cooley and pulled Day out of the Parish System and began a home study program in December of 1984. In March of 1985 the Home bound teacher terminated her services and Day was reenrolled in the Parish School System at G. B. Cooley. She remained at G. B. Cooley until August of 1985, through the summer school session. In this period of time the government ordered the children at G. B. Cooley to be returned to the Parish School System as they were not in compliance with 20 U.S.C. 1401 et seq., the Education of the Handicapped Act. Subsequently, Day was enrolled in Kiroli

Elementary School. Day remained at Kiroli Elementary until February of 1986, when her parents again removed her from the Parish System and reenrolled her at the Institute of Logopedics.

Her parents instituted this due process hearing charging that Day was denied a free appropriate education in the Parish System. They also ask that they be reimbursed for the expenses incurred in enrolling the child in the Institute of Logopedics.

V. APPLICABLE LAW

1. Should the exhibits, Weil 23-31 (The Reports of the Institute of Logopedics), be admitted into evidence?

The Due Process Hearing is an administrative hearing as such it is governed by the Administrative Procedures Act. The courts of this state have interpreted the statutes governing administrative hearings to allow hearsay evidence. Fisher vs. Louisiana, State

Board of Medical Examiners, 352 So2d 729 citing La. R.S. 49:956. The evidence is admitted subject to objections of irrelevancy, immateriality, incompetency or repetitiousness.

In a further protection, Bulletin 1706 provided that all evidence to be introduced at a hearing must be disclosed to the opposing party "at least five (5) operational days before a hearing." Bulletin 1706, Sec 511 (c) 3. The evidence in this instance was properly admitted. However, in a more recent decision involving wages the court made the following observation. If the only evidence submitted is hearsay evidence then the finding should be set aside, since the party (claimant) is not offered a fair opportunity to rebut or cross examine the offending documents. Thigpen vs. Administrator of Employment Security, 488 So2d 1213 (La App 4th Cir 1986). Therefore, it should logically follow if

a party to a hearing submits hearsay evidence only to prove an aspect of his case that portion of the case should be reversed. The importance of this rule will be explained later in the decision.

2. Did the Ouachita Parish School Board provide Kimberly Day Weil with a free appropriate public education?

The Hearing Officer in the instant case went to great length in explaining why he reached the conclusion that Kimberly Day Weil did not receive a "free appropriate public education." The decision was concluded with the statement that "I find that a prima facie case has been established that a free appropriate public education was not provided", he then places the burden on the school board to rebut the prima facie case.

The Federal Courts have been very clear in their intrepretation of the applicable law in this area. In Tatro

vs. Texas, 703 F 2d 823 (5th Cir 1983) Aff'd 468 U.S. 883, 104S:Ct 3371, 82 L. Ed 2d 644 (1984), the court stated that the EAHCA has "placed primary responsibility for formulating handicapped children's education in the hands of state and local agencies in cooperation with each child's parents." In elaborating on the Tatro decision the court in Alamo Heights Independent School District vs. State Board of Education, 790 F. 2d 1153 (5th Cir 1986) states that "in reference to this statutory scheme and the reliance it places on the expertise of local educational authorities, we stated in Tatro that the Act creates a 'presumption in favor of the educational placement established by [a child's] I.E.P.' and 'the party attacking its terms should bear the burden of showing why the education setting established by the I.E.P. is not appropriate'", (Supra at 790 2d at 1158).

In Burlington School Committee of the Town of Burlington Massachusetts, et al vs. Department of Education of the Commonwealth of Massachusetts, 471 U.S. _____, 85 L Ed 2d 385,105 S Ct____ 1985, the court discusses the burden of proof required in a trial do Novo in district court. Recognizing that the act provides for state or Federal review to "any party aggrieved by the findings and decisions made after the due process hearing." The court then states:

> "The Act confers on the reviewing Court, the following authority:
>
> 'The court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determined is appropriate'". 20 USC 1415 (e) (2)

Thus it follows that if the burden is in the parents and that burden must be proved it is not satisfied by the prima facie case. The parents must prove their case by a preponderance of the evidence

to rebuttle the presumption that exist in favor of the School Board. Therefore, the Hearing Officer's decision was predicated on an incorrect principal of law.

The evidence presented does not preponderate in favor of the Weils. A "free appropriate public education" mandates a school district to have a program with requirements that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child, Board of Education vs. Rowley 458 US 176, 200, 102 S Ct 3034, 3048, 73 L. Ed 2d 690 (1982), Alamo Heights Independent School District vs. State Board of Education, 790 F2d 1153, (5th Cir 1986). As was stated in a similar case, "the fact that an emotionally disturbed child experiences regression at one point although regretable is neither suprising nor exceptional." Scokin vs. State of

Texas, 723 F 2d 432 (1984). Factually, the Scokin case is similar to the one presently under consideration.

The parents have failed to carry the burden of proof necessary to prove the School Board did not comply with its duty.

3. Can the Ouachita Parish School System presently provide a free appropriate public education for Kimberly Day Weil?

The Education of the Handicapped Act (20 U.S.C. Sec 1401 et seq.) requires participating state and local education to assure that handicapped children are guaranteed certain procedural safeguards that will ensure the child a free appropriate education in the least restrictive environment. The State in an effort to ensure the Federal regulations were followed enacted Louisiana Revised Statutes 17:1941 et seq., Educational

Opportunities for Exceptional Children's Act. Section 1944(c) of this Act provides that:

> "C. To make the most effective use of human and fiscal resources available for special education and related services, the Department of Education, with the approval of its governing authority, shall issue regulations with respect to this Chapter. These regulations shall be written in cooperation with representatives from other state and private agencies involved in special education services, parish and city school boards, teachers of children receiving special education services, regular classroom teachers, universitites and colleges, nonpublic schools providing special education and related services, and representatives of recipients of special education and related services and their families."

Pursuant to the above the State Department of Education carefully compiled Department of Education Bullentin 1706 (Regulations for Implementation of the Exceptional Children's Act).

Section 402 of Bulletin 1706 defines "Free Appropriate Public Education" (FAPE)

"Section 402. Definitions

A. Free Appropriate Public Education (FAPE)

1. "Appropriate public education" means all special education and related services provided each exceptional child which--

a. meet State Board standards, including these Regulations and all applicable bulletins approved by the State Board (i.e., Bulletin 741, Bulletin 746, Bulletin 1508).

b. are provided in conformity with an IEP at public expense, under public supervision and direction and without charge, including preschool, elementary school, or secondary school education.

2. The term "free" means without charge, including the following:

a. cost for all room, board, and non-medical care provided when residential educational placement is necessary.

b. costs for an independent (not necessarily private) individual evaluation provided when a parent disagrees with an individual evaluation conducted by the school system either fails to initiate a hearing or fails to prevail in a hearing to show that is evaluation

is appropriate, or when an independent educational evaluation is requested by a hearing officer, the Department's Special Education Review Panel, or a court of competent jurisdiction.

c. transportation costs provided in order to assure access of persons to services necessary to implement a child's IEP. Exceptional children shall be provided, on a comparable basis with that of children who are nonexceptional, an opportunity to receive transportation services funded out of State or local resources.

d. The term "free" does not preclude incidential fees normally charged to nonhandicapped children or their parent(s)/guardian(s) as a part of the regular educational program"

The United States Supreme Court in exploring "free appropriate education" states that it must be tailored to the needs of the child allowing that child to benefit educationally. However, the state is not required to maximize the potential of the handicapped child with opportunities provided for non-handicapped children. State Board of Education vs. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L Ed 690 (1982).

The School Board in the instant case has the support services and is willing to provide the same but there has been no request.

If the hearing officer predicated his opinion in this issue in the reports received from the Institute of Logopedics, then he was in error for the reasons stated above in the case.

4. Should the Parents of Kimberly Day Weil be reimbursed for the expenses occasioned by the transfer to the Institute of Logopedics?

The parents in this case are seeking reimbursement for the funds they expended in Day's residency in the Institute of Logopedics. There are no provisions in State law to allow the recovery of educational expenses. If any recovery is to be had it must be awarded under the provisions of The Education of

the Handicapped Act (20 USC Sec. 1401, et seq.), the Federal Law. The federal law requires participating state and local agencies to assure that handicapped children and their parents are guaranteed procedural safeguards with respect to the provisions of "free appropriate education." These procedures include the rights of the parents to participate in the development of an Individualized Education Program (IEP) for the child. If they are provided with a procedure (The Due Process Hearing to challenge the preposed IEP, if the parents disagree they are required to pursue the statutory remedies to first make a determination if the School District in fact met its obligations. Marvin H. vs. Austin Independent School District, 714 F2d 1348 (1983). To be able to receive funds they must first establish by a preponderance of the evidence that the School Board did not provide Day with a "free appropriate

education." They fail in this endeavor, so this issue is moot.

However, the actions of the Hearing Officer must be examined in the light of the existing law. The Hearing Officer had no power or authority to make a monitary award in this case. The State statutes do not confer any authority on the hearing officer to make monitary awards nor do the Federal Statutes.

The Federal Law clearly states that "any party aggrieved by the finding and decisions" made AFTER the due process hearing may be appealed to the applicable State or Federal Court. The act then confers in the reviewing COURT the authority to "grant such relief as the Court determines is appropriate." 20 USC Sec 1415 (e) (2). The court then can grant reimbursement of expenses, not the Hearing Officer.

There was some discussion in the Hearing Officer's decision as to the eligibility of the parents. It should be noted for the record that the parents unilaterally pulled the child out of the Parish School System. This was done prior to requesting an IEP conference or a Due Process Hearing. In each and every case discussed by the Hearing Officer the child was pulled out of the system while the case was on appeal, this is not the fact here.

To avail themselves of the "Appropriate Relief" the parents have certain obligations. If the parents disagree with the state's decision regarding evaluation or placement of their child, "they must pursue statutory remedies to determine if the state has in fact met its obligation and whether it is financially responsible for special education requirements", Stacy G. vs. Pasadena Independent School District, 695

F. 2d 949 (5th Cir 1983); Marvin H. vs. Austin Independent School District, 714 F 2d 1348 (5th Cir 1983). The parents in the instant case have completely ignored state requirements on placement.

Under the existing statutes and regulations, Ouachita Parish School Board could not, considering the evidence submitted, provide funding to the Institute of Logopedics. All nonpublic schools must be approved by the State Education Authority (SEA) of the state in which it is located. (Bulletin 1706 Sec 452 (B) 2 a, LA. R.S. 17:1943 (2), La. R.S. 17:1946).

Residential placement cannot be considered for Kimberly Day Weil at the Institute of Logopedics in Wichita, Kansas. The sole purpose of this hearing was to obtain placement for Day at the Institute of Logopedics and to have that placement funded, such placement is impossible. There is no evidence that

the Institute is approved. While placement at the Institute of Logopedics may be working, that is not the standard for determining a "free appropriate education." In Hersler vs. State Department of Education of Maryland 700 F2d 134, the court states that because a given educational placement is allegedly more appropriate than another, it does not follow that the less appropriate program is "not appropriate within the meaning of the Act."

The Hearing Officer erred in finding the proper placement and in ordering funding.

VI. DECISION

It is the decision of the review panel that the findings of the Hearing Officer are affirmed in part and reversed in part. The admission of hearsay evidence was proper subject to the rules

on sufficiency of evidence. The Hearing Officer is reversed in all other aspects of his decision.

The appropriate placement for Kimberly Day Weil is Kiroli Elementary School and remain so until IEP conference can indicate otherwise. The School Board has the facilities to service Kimberly Day Weil. The parents of Kimberly Day Weil are not entitled to reimbursement for expenses incurred in funding her present educational environment.

APPEAL RIGHTS

The decision of the Review Panel shall be final unless a party brings a Civil Action within thirty (30) operational days of the decision.

Signed this 29th day of May, 1987.

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APPENDIX C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
SEPTEMBER 10, 1987
PARKER, C.J.

DONNIE WEIL AND KIM WEIL,
INDIVIDUALLY AND ON BEHALF
OF THEIR MINOR DAUGHTER,
DAY WEIL

CIVIL ACTION

VERSUS

NO. 87-472-A

THE BOARD OF ELEMENTARY AND
SECONDARY EDUCATION AND THE
OUACHITA PARISH SCHOOL BOARD

****

This matter is before the court on a motion by defendant, the Board of Elementary and Secondary Education (BESE), is dismiss under Rule 12(b)(1). Defendant, Ouachita Parish School Board has filed a motion to transfer venue and in the alternative for serverance, as well as a motion to dismiss for failure to state a claim and for partial summary judgment. There is no need for oral argument. Jurisdiction is allegedly

based upon 20 U.S.C. Sec. 1415(e)(2) and 28 U.S.C. Sec. 1343; 42 U.S.C. Sec. 1983.

Plaintiffs filed this action, claiming that BESE and the School Board have failed to provide their handicapped child a free appropriate public education as required by the Education for All Handicapped Children Act (EAHCA, 20 U.S.C. Sec. 1401, et seq.). The complaint alleges that the child was placed by the parents in a private residential facility; that when the Board declined to pay, administrative proceedings were instituted; that the administrative hearing held at the office of the School Board resulted in an order for partial payment of the cost of the private placement; and that both parties appealed this decision to a Review Panel of the defendant, BESE, which unanimously reversed the decision of the hearing officer. Subsequently, this action was filed seeking judicial review of the

administrative decision, under 28 U.S.C. Sec. 1415(e)(2) and to redress the alleged deprivation of civil rights under color of state law under 42 U.S.C. Sec. 1983. Plaintiffs pray for judgment against both defendants in solido for $640,000 plus interests and costs.

Defendant, BESE, argues that it should be dismissed from the action under Rule 12(b)(1) because any claims plaintiffs have against it are barred by the Eleventh Amendment to the United States Constitution. BESE asserts that it is a state agency or alter ego of the state. Therefore, any claim against it is brought against the state and is barred by the Eleventh Amendment. This court applied the analysis set out by the Fifth Circuit in **Tradigrain, Inc. vs. Miss. State Port Authority,** 701 F.2d 1131 (5th Cir. 1983), in the case of **Kiper v. La. State Board of Elementary Educ.,** 592 F. Supp. 1343 (M.D. La. 1984) and

determined that BESE is indeed an agency within the executive branch of the state government. As fully discussed in Kiper, a suit against BESE is a suit against the State of Louisiana. The Supreme Court has held in **Quern v. Jordan**, 440 U.S. 332 (1979), that Congress did not intend to abrogate the states' immunity to suit in Sec. 1983 actions. Thus, it is clear that at least the Sec. 1983 action is barred by the Eleventh Amendment.

Since the plaintiffs also claim that BESE is liable under the EAHCA, 20 U.S.C. Sec. 1401, the court must determine whether the Congress intended to waive the sovereign immunity of the states which participate in the EAHCA program. Alternatively, it must be determined whether the state waived its sovereign immunity when it chose to participate. If the Congress did abrogate sovereign immunity in enacting Sec. 1415(e)(2), then the Eleventh

Amendment would be no bar to plaintiffs' claims against BESE under the EAHCA. Plaintiffs argue that by authorizing a civil action in a federal forum in Sec. 1415(e)(2), the Congress conditioned the right to receive funds under the EAHCA on the state's amenability to suit in federal court. According to plaintiffs, the Congress did this when it authorized suit in federal court against a class of defendants that included the states. Plaintiffs also assert that the state consented to suit and waived its sovereign immunity when it received federal funds under the act.

In support of this contention, plaintiffs rely upon the decision in **Department of Education, State of Hawaii vs. Kathleen D.,** 727 F.2d 809 (9th Cir. 1983) where the Ninth Circuit apparently held that participation by a state in the EAHCA program constituted an automatic waiver of sovereign immunity.

The case is not persuasive in light of recent U.S. Supreme Court and Fifth Circuit opinions on Congressional waiver of severeign immunity. The provisions of the EAHCA involved in this case are analogous to the Rehabilitation Act of 1973 which was an issue in **Atascadero State Hospital v. Scanlon,** 105 S.Ct. 3142 (1985). A section of the Rehabilitation Act provided that the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964, shall be available to any person aggrieved by any act of failure to act by an recipient of federal assistance. The court stated that there was no doubt that the state involved was a recipient of federal aid under the statute. However, the court asserted that states are not like any other class of recipents of federal aid and a general authority for suit in federal court is not the kind of unequivocal statutory language sufficient

to abrogate the Eleventh Amendment. In considering whether the state consented to suit by participating and receiving money under the act, the court held that the conclusion of the lower court was in error. Just becasue various provisions of the act are addressed to the states, does not mean a state necessarily consents to suit in federal court by participation in its programs. The Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. In addressing the question of whether the state of Texas enjoyed sovereign immunity with respect to the Jones Act, the Fifth Circuit in **Welch v. State Dept. of Highways and Public Trans.**, 780 F.2d 1268 (5th Cir. 1986), reviewed the major Supreme Court and Fifth Circuit cases on this issue. The court cited **Atascadero**, in holding that absent express waiver of sovereign

immunity by the state or the presence of unequivocal language in the Jones Act itself, the state court successfully claims its Eleventh Amendment defense. The Fifth Circuit noted that the Supreme Court had established a bright line rule that the Congress could force the states to yield their sovereign immunity only when it so stated in unequivocal language within the statute itself. The Ninth Circuit itself recently held in **Doe v. Maher**, 793 F.2d 1470 (9th Cir. 1986) that the **Hawaii** case is no longer controlling in view of the Supreme Court's decision in **Atascadero.** The Ninth Circuit held that the Eleventh Amendment shielded the state from damages liability in a suit for violation of the EAHCA.

Applying these principles to the case before us, it is evident that §§ 1414(e)(2) of the EAHCA is not the clear and unequivocal language that is required in order for the court to find

Congressional intent to abrogate the sovereign immunity of the states which participate in the program. Just as in **Atascadero**, BESE, an agency of the State of Louisiana is merely one a class of defendants against whom suit is authorized in federal court. This was not enough to find a lifting or waiver of sovereign immunity in **Atascadero**, therefore it is not sufficient in this case. The applicable provisions of EAHCA do not have the unmistakably clear language required to hold the BESE's Eleventh Amendment defense must fall when a civil action for damages is brought against it in federal court.

Accordingly, BESE's motion to dismiss under Rule 12(b)(1) is hereby GRANTED and BESE is hereby DISMISSED. In light of this determination, there is no basis for venue in the Middle District and the School Board's motion for change

of venue is hereby GRANTED and this action will be transferred to the Western District of Louisiana.

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

DONNIE WEIL, ET UX

versus

CIVIL ACTION NO.
88-1187

BOARD OF ELEMENTARY
AND SECONDARY EDUCATION, ET AL

MEMORANDUM RULING AND ORDER

This is an action for damages by Donnie Weil and Kim Weil ("the Weils") and on behalf of their daughter, Day Weil (Day). The action originally named the Board of Elementary and Secondary Education ("BESE") and the Ouachita Parish School Board ("OPSB") as defendants; however, BESE was dismissed from this action leaving OPSB as the sole remaining defendant. The case was subsequently transferred from the Middle District of Louisiana to this Court by an

order dated September 17, 1987. Later, several of plaintiffs' jurisdictional claims were dismissed by this Court by an order dated October 19, 1988. A trial on the remaining claims was held on December 18, 1989. This Court now considers the propriety of the plaintiffs' claims in this case, which are as follows: First, the plaintiffs contend that Day, a severely mentally retarded child, was denied a free appropriate public education by the defendant in the Fall semester of 1985 under the provisions of the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. Sec. 1401, et seq., and the regulations thereunder; Second, the plaintiffs claim that Day was deprived of her civil rights under color of state law in contravention of 42 U.S.C. Sec. 1983 and 1988 and; Third, the plaintiffs claim that the defendant is liable to them for a pendent state law claim based on Article 2315 of

the Louisiana Civil Code. Having reviewed the evidence adduced at trial and considered the applicable law, this Court is of the opinion that plaintiffs' claims must be rejected.

FACTS AND PROCEDURAL BACKGROUND

Day Weil was born on October 3, 1976. Day is a severely retarded child. She is non-verbal and uses signing and communication boards to communicate. She has poor motor skills and a seizure disorder for which she is on medication. Day also has behavioral problems and at times pinches, pulls hair, bites and refuses to cooperate. Communication and self-help skills are the most important aspects of Day's educational placement.

This litigation arises from Day's placement in the Ouachita Parish School System at Kiroli Elementary School ("Kiroli") from the Fall of 1985 to February of 1986. Prior to Day's placement at Kiroli, Day had been placed

in different educational environments. A brief outline of Day's educational history before and after entering Kiroli is helpful to understanding the issues in this case.

In May of 1978, Day entered the Strauss Rehabilitation Center. She remained there for almost three years. At that same time, she received private speech therapy in the home. In 1979, Day became eligible for pre-school and entered Sherrouse Elementary School in September, still attended Strauss Rehabilitation Center and received speech therapy at home. In August of 1980, Day entered Crosley Elementary School, where she remained until February of 1981. Day was evaluated by and subsequently placed in Columbia State School in March 1981, where she remained until February of 1983, when she was entered in the Institute of Logopedics in Wichita, Kansas. Day remained there until August

of 1983, when she had to leave to enter the hospital because of problems with her seizure disorder. In October of 1983, Day was placed at Riser Elementary School through January of 1984, when her placement was changed to G. B. Cooley. In August of 1984, the Weils hired a private tutor for Day, and Day began attending G. B. Cooley part-time. In December of 1984, Day stopped attending G. B. Cooley and received private tutoring on a full-time basis. In April of 1985, Day was re-enrolled in G. B. Cooley and no longer received private tutoring. Day remained there until August of 1985, when she began attending Kiroli. In February of 1986, Day was removed from Kiroli and re-placed in the Institute of Logopedics, where she remained until June of 1988, when she returned to the Columbia State School, which remained her placement as of the time of trial. It is the time that Day

was re-enrolled at G. B. Cooley in April of 1985 until her removal from Kiroli in February of 1986 that forms the basis for this litigation.

The plaintiffs complain about the manner in which an individual education plan (IEP) was formulated for Day in 1985. An IEP was formulated and agreed upon by Day's parents and OPSB officials on May 2, 1985. The plaintiffs complain that no new IEP was prepared prior to Day's entering Kiroli. An IEP conference was held on October 3, 1985, but it was post-poned at the request of the Weils, who claimed the absence of a physical and an occupational therapist precluded the preparation of a new IEP. On November 7, 1985, an IEP was finally agreed upon and executed by the Weils and OPSB officials (without the presence of an occupational or physical therapist).

The plaintiffs also complain that when school began at Kiroli, Day's classroom facilities were inadequate. Day's class was required to meet in the school's cafeteria for seven to ten days. Subsequently, the class met in a "portable band building" for several weeks. Finally, Day's class was moved to a temporary building for the remainder of the semester. The plaintiffs complain that the materials for Day's class were not removed from their original boxes or containers until the class moved to the temporary building where Day's class finished out the semester.

Although Day received individual speech therapy several times a week at Kiroli, the Weils complain that the facilities where the therapy took place were inadequate. Mr. Weil describing the room where the therapy took place as a "closet" in the cafeteria.

Finally, plaintiffs claim that Day was denied occupational therapy in the Fall of 1985. Day's November 7, 1985, IEP called for evaluation for physical and occupational therapy. When occupational therapy was subsequently denied (with the expectation by the Weils that physical therapy would also be denied), this was, as plaintiffs' counsel described it, the "proverbial straw" which caused the Weils to withdraw Day from Kiroli and to place Day at the Institute of Logopedics in February of 1986.

DISCUSSION

The EAHCA Claim

Plaintiffs claim that Day was denied a free appropriate public education in violation of the EAHCA, 20 U.S.C. Sec. 1401, et seq. This act provides federal funding to assist state and local agencies in the education of handicapped children, and conditions such

funding upon State's compliance with the Act's provisions and goals. See 20 U.S.C. Sec. 1412, Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); Burlington School Committee v. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). Louisiana has qualified for an receives federal funds pursuant to a plan and regulations approved under this act. The OPSB received funds pursuant to that plan and the accompanying regulations and is therefore subject to the terms of the EAHCA.

The EAHCA was adopted in an effort by Congress to promote the education of handicapped children. Rowley, supra; Burlington, supra. In order to qualify to receive funds under the EAHCA, a state must have "in effort a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. Sec. 1412(1). The

state's policy must be accomplished by a state plan submitted to and approved by the state Secretary of Education. 20 U.S.C. Sec. 1413. This plan describes the goals, programs, etc. which the state intends to use to educate its handicapped children. 20 U.S.C. Sec. 1412-1413.

The "free appropriate public education" mandated by the EAHCA is accomplished by an IEP, which is a written statement prepared by a representative of the local education agency, the child's teacher, the child's parents or guardian, and when appropriate, the child, and is designed to meet the unique needs of the handicapped child. 20 U.S.C. Sec. 1401 (18-19); Rowley, supra; Burlington supra. There are also the following specific elements which must be included in the IEP.

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such servies, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. Sec. 1401(19). The IEP must also be reviewed, and where appropriate revised, periodically by local educational agencies, but not less than annually. 20 U.S.C. Sec. 1414(a)(5) and Sec. 1413(a)(11). The EAHCA's IEP procedures "are not mere procedural hoops through which Congress wanted state and local educational agencies to jump." Daniel R.R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989). "Rather, the formality of the Act's procedures is itself a safeguard against arbitrary and erroneous decisionmaking." Daniel R.R.,

874 F.2d at 1041, citing Jackson v. Franklin County School Board, 806 F.2d 623, 630 (5th Cir. 1986). A violation of the EAHCA's procedural gaurantees may by itself be a sufficient ground for finding that an educational agency has failed to provide a "free appropriate public education" in violation of the EAHCA. Daniel R.R., supra; Jackson, supra. agreeing with Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985).

The plaintiffs complain that OPSB no new IEP was prepared for Day at the beginning of the Fall semester at Kiroli. The plaintiffs suggest that this failure was sufficient, standing alone, to deny Day "a free appropriate public education." This Court disagrees.

Although the OPSB was under an obligation to have an IEP in effect at the beginning of the Fall of 1985 semester, (See 20 U.S.C. 1414(a)(5) it was not necessary that a new IEP be in

effect before the beginning of the semester under the circumstances of this case. The Code of Federal Regulations make it clear that once an IEP has been prepared for a handicapped child, the yearly IEP meeting required under the EAHCA can be held at anytime within that year at the discretion of the educational agency as long as an IEP meeting is held at least once a year. See 34 C.F.R. Sec. 300.343; 34 C.F.R. P 300, App. C. Additionally, even though a child is moved to a new placement, a new IEP need not be prepared if the child's current IEP can be implemented. 34 C.F.R. P 300, App. C.

In this case, a new IEP had been prepared with the participation of OPSB officials at G. B. Cooley in May of 1985, a few months prior to Day's enrollment at Kiroli, and that IEP was available to be implemented when Day entered Kiroli. The OPSB did not violate the procedural

requirements of the EAHCA. It may have been preferable to have an IEP meeting before the Fall semester began, however, that decision was within the discretion of the OPSB. Additionally, there was testimony at trial that both parties had problems beyond their control which prevented an IEP from being executed at an earlier date. The OPSB was forced to prepare for a change in the placement of its handicapped students at the last moment which presented a great strain on available resources. Additionally, Mrs. Weil's health problems at that time may have also contributed to the IEP delay. Under these circumstances, the failure to execute an IEP before the Fall semester of 1985 was not a violation of the EAHCA's procedural requirements and did not per se deny Day a "free appropriate public education."

The EAHCA requires the state to set up other extensive procedural devices, including notice requirements to the child's parents for changes in "the idenitification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child." EAHCA allows the parents to being a complaint about "any matter relating to the indentification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. Sec. 1415(b)(1)(C), (D) and (E). The complaints are heard as follows: First, the complaint is resolved at "an impartial due process hearing"; Second, if the due process hearing is conducted by the local educational agency, then an appeal to the state educational agency must be allowed and; If there remains an aggrieved party after the state

administrative proceedings, then that party has the right to bring a civil action in either state or federal court. 20 U.S.C. Sec. 1415(b)(2), (c) and Sec. 1415(e)(2). The parties are also accorded certain rights at the administrative hearings pursuant to 20 U.S.C. Sec. 1415(d).

In this case, the Weils were accorded all of these procedural safeguards. They had a due process hearing in front of a hearing officer whose decision was in favor of the Weils. The hearing officer's decision was subsequently reversed on an administrative appeal. That decision on appeal, in turn, led to the instant court action by the plaintiffs.

EAHCA does not provide a comprehensive definition of a "free appropriate public education."

> According to 20 U.S.C. Sec. 1401(18), the term "free appropriate public education" is definded as follows:

> ... special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

Despite this, the courts have been able to give substance to the phrase "free appropriate public education." EAHCA does not require a state to maximize each child's potential "commensurate with the opportunities provided other children, ... rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education." Rowley, 458 U.S. at pp. 198 and 200. Despite the fact that Congress did not place strict requirements or standards on the states in providing a "free appropriate public education," it is apparent that Congress

intended to require that "some educational benefit" be conferred to the handicapped child Rowley, supra.

Accordingly, the Supreme Court has held that the requirement of a "free appropriate public education" is satisfied when the state, or local entity provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Rowley, 458 U.S. at p. 203. See also Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986). "The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child, in accordance with 'the unique needs' of that child." Alamo Heights Independent School District, supra, 790 F.2d at p. 1158, citing Crawford v. Pittmann, 708 F.2d 1028 (5th Cir. 1983).

As mentioned previously, EAHCA requires extensive procedural mechanisms at the administrative level which allow a parent(s) to purse a complaint about a handicapped child's education. See 20 U.S.C. Sec. 1415. If the administrative proceedings are unsuccessful, then the aggrieved party may bring a court action. See 20 U.S.C. Sec. 1415(e)(2). In reviewing the proceedings, the court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate." Id.

A reviewing court must give due weight to the administrative proceedings. Rowley, supra. Congress placed great importance on procedural safeguards in adopting EAHCA, for example, giving parents and guardians the right to

participate at every stage of the administrative process, as well as requiring that the Secretary of Education approve state and local plans for education. Id. This demonstrates Congress' belief that compliance with the procedural requirements would protect all or almost all of what Congress hoped in the way of substantive content of an IEP. Id. Thus, a court must give weight to the procedural process when determining what relief is appropriate to grant under 20 U.S.C. Sec. 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedure reasonably calculated to enable the child to receive educational benefits?" Rowley, 458 U.S. at pp. 206-207. If a court finds that these requirements have been met, then it can require no more from the states. Rowley, supra.

In determining whether the requirements of the EAHCA have been met, the court must mindful not to impose its view of preferable education methods upon the states. Id. Congress left the primary responsibility for that determination to the state or local educational agencies in cooperation with the child's parents. Id. See also Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984); Alamo Heights Independent School District, supra. "Courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" Rowley, 458 U.S. at p. 208, citing San Antonio Independent School District v. Rodriguez, 411 U.S. at p. 42. Because EAHCA requires deference to the expertise of local educational authorities, there is a presumption in favor of the child's educational

placement established by the child's IEP and the party attacking the IEP's terms bears the burden of proving why the IEP placement in inappropriate. Alamo Heights Independent School District, supra; Tatro, supra.

This does not mean that a child is left unprotected. Rather, EAHCA protects the child by parental involvement at all stages of the administrative proceedings, as well as in the creation of the child's IEP. Rowley, supra.

The hearing officer at the administrative level stated in his decision that he found "no progress achieved by Day whatever" while enrolled at Kiroli. See Reasons For Decision And Hearing Decision of hearing officer at p. 13. While this Court realizes some deference is due the fact finding at the administrative level, the record is

replete with evidence to the contrary and thus the hearing officer's findings cannot be adopted by this Court.

Day's educational environment was not perfect and perhaps did not offer facilities which would maximize her potential; however, that is not what is required. Rather, the obligation of the OPSB was to provide Day with "some educational benefit" in the Fall of 1985. This the OPSB did.

Day was provided individual speech therapy several times a week by a qualified speech therapist at Kiroli. The evidence showed that she made some progress, and Day learned several signs, although not with complete accuracy. Certainly the facilities where the therapy took place were small, however, only Day and the therapist occupied the room while the therapy was administered and Day derived some benefit from the therapy.

Day's self help skills also showed some improvement while at Kiroli, though, as at the Institute of Logopedics, Day had difficultly improving her motor skills. Perhaps occupational or physical therapy would have helped Day in these areas in the Fall of 1985. The Weils had signed an IEP that called for evaluation, not implementation, of these therapies. It was determined that, although such therapy may have been helpful, it was not necessary and thus it was denied. The Weils, as Mr. Weil testified, knew that the appropriate method for appealing or correcting this decision was to request an IEP meeting or to invoke an administrative proceeding, but instead they withdrew Day from Kiroli. The plaintiffs have not shown that the denial of these therapy services deprived Day of a "free appropriate public education." This Court must defer to the decision of the school officials

since the decision to deny therapy is a question more appropriately handled by experienced education officials through the procedures which are so carefully laid out by Congress in the EAHCA.

The record is clear that Day has severe learning problems and commonly experiences periods of progression and regression. Day needs a structured environment and changes in environment are difficult for her and can lead to periods of regression. As can be seen from Day's educational placement history, however, she has experienced many changes in environment. Her stay at Kiroli was short and she had little time to adapt to the environment before moving on to the Institute of Logopedics. It is difficult to judge her progress at Kiroli. Perhaps Day's progress would have been maximized at another facility, like the Institute of Logopedics, where she would have had a more structured environment with full-

time care in a residential setting. Maximization, however, is not required under EAHCA. Although Day did not achieve many of her IEP goals at Kiroli (or the Institute of Logopedics for that matter), an IEP is not a performance contract and the OPSB cannot be held accountable simply because Day did not achieve all of her IEP goals. 34 C.F.R. p 300, App. C. Day was not denied a "free appropriate public education" by the OPSB while enrolled at Kiroli.

The Weil's removed Day from the Ouachita Parish School system unilaterally. They did so at their own financial risk. Burlington, supra. The Weils are barred from obtaining reimbursement for Day's interim placement at the Institute of Logopedics. Id. The plaintiffs presented no proof that the OPSB cannot now provide a "free appropriate public education." The OPSB can provide an appropriate education, as

was confirmed by the uncontradicted testimony of Mr. Hoyt Lee, Assistant Superintendent of Schools. Thus, the plaintiffs cannot obtain recovery for Day's educational expenses in the future.

The Section 1983 Claim

The plaintiffs' second claim under Section 1983 must now be considered. EAHCA is the exclusive remedy for handicapped children asserting the right to a "free appropriate public education," therefore EAHCA may not be claimed as the basis for a Section 1983 action. Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984); Alamo Heights Independent School District, supra. The plaintiffs' claim that Day was denied her civil rights because she was denied a "free appropriate public education" is not a basis for relief under Section 1983. Section 1983, however, may be a grounds for relief for an independent procedural due process

violation. Alamo Heights Independent School District, supra.

The plaintiffs allege certain violations of procedural due process, claiming that the administrative appeals laws of Louisiana should be declard invalid due to their contravention of the federal due process clause. In considering what procedural protections are required by the Constitution, the Supreme Court has enumerated several factors which must be considered and weighed, which are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). This is a flexible concept that varies with the particular situation. Id.

Applying this standard to the case at hand, the plaintiffs have failed to carry their burden of proving that they, or any future claimant, were or would be deprived of procedural due process by the administrative process provided under state law. The plaintiffs received an impartial due process hearing, an appeal at the state level, and subsequently filed this action in this Court. EAHCA procedures were followed at the administrative level and Congress took great care in creating these procedural safeguards to insure that the handicapped child's interests would be adequately protected. Plaintiffs have brought forward no proof, other than the adverse administrative appeal decision itself, that the administrative procedures

prescribed by Congress and adopted by Louisiana were or are inadequate, nor have the plaintiffs demonstrated any substitute or additional safeguards that would be of more value than the current procedures. The plaintiffs have no basis for relief under Section 1983.

The Louisiana Civil Code Article 2315 Claim

Since this Court has determined that Day was provided a "free appropriate public education" by OPSB, plaintiffs' cause of action under Article 2315 must fail. Additionally, because EAHCA is the exclusive remedy available for the denial of a "free appropriate public education," Article 2315's "fault" provisions cannot be used here by plaintiffs to assert what is essentially an EAHCA cause of action for denial of a "free appropriate public education." Alamo Heights Indepe dent

School District, supra. Plaintiffs' claims under Article 2315 provide no basis for relief in this lawsuit.

CONCLUSION

For the reasons stated above, the plaintiffs' claim against OPSB are hereby dismissed with prejudice at plaintiffs' costs. IT IS SO ORDERED.

Judgment approved as to form in accordance with this opinion shall be signed upon presentation.

THUS DONE AND SIGNED at Monroe, Louisiana, this 16th day of May, 1990.

Donald E. Walter
DONALD E. WALTER
United States District Judge

APPENDIX E

Donnie WEIL, et ux., Plaintiffs-Appellants,

v.

BOARD OF ELEMENTARY & SECONDARY EDUCATION, et al., Defendants-Appellees.

No. 90-4438.

United States Court of Appeals, Fifth Circuit.

May 28, 1991.

Appeal from the United States District Court for the Western District of Louisiana.

Before, RUBIN, POLITZ and DUHE, Circuit Judges.

POLITZ, Circuit Judge:

Donnie Weil and Kim Weil, individually and on behalf of their minor daughter, Kimberly Day Weil, appeal the dismissal of their claims against the Ouachita Parish School Board ("OPSB") and the Louisiana Board of Elementary and Secondary Education ("BESE"). Finding

neither error of fact nor law in the judgments rendered by the two district courts herein, we affirm.

Background

Kimberly Day Weil is a severely mentally retarded child. This litigation involves her educational placement from August 1985 to February 1986 while she was within the jurisdiction of OPSB which, through the State of Louisiana, participated in the program established by the Education of the Handicapped Act (EHA), 20 U.S.C. Sec. 1401, et seq. The EHA makes federal funding available to public schools for the education of handicapped children provided that the "State has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. Sec. 1412. The EHA, its concomitant regulations, and the pertinent Louisiana statutes establish

various substantive and procedural requirements designed to achieve this end.

The Weils were discontented with the educational program OPSB provided Kimberly, particularly her abrupt transfer, in August 1985, from G. B. Cooley School to the Kiroli Elementary School. They voiced dissatisfaction with the quality of the educational program at Kiroli and withdrew their daughter from Kiroli, placing her in the Institute of Logopedics, a private residential facility.

The Weils first initiated an administrative claim, asserting that OPSB had failed to provide Kimberly with a free appropriate public education as required by EHA. Following an administrative hearing, the hearing officer ordered that the Weils should be reimbursed the cost of placing Kimberly in the Institute of Logopedics. The

ruling, however, was in favor of OPSB as to future placement. Both parties appealed to BESE which reversed that portion of the administrative decision in favor of the Weils and affirmed the ruling in favor of OPSB.

The Weils filed the instant suit against BESE in the Middle District of Louisiana, the district of BESE's domicile, asserting claims under the EHA and 42 U.S.C. Sec. 1983, maintaining, under the latter, that the BESE administrative review process denied them both substantive and procedural due process. They also sought judicial review of the administrative decision in favor of OPSB.

BESE successfully moved for dismissal of the claims against it, raising an eleventh amendment defense.

> The court found BESE, a state agency, was immune from the procedural due process claim brough under section 1983, Quern v. Jordan 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), and from the

substantive due process claim brough under the EAHA because that act did not contain unequivocal language abrogating immunity as required by Atascadero v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).

OPSB successfully sought a change of venue to the Western District of Louisiana, the district of its domicile. Following a bench trial, the district court in the Western District entered judgment in favor of OPSB. The Weils timely appealed the judgments of both the Middle and Western Districts.

Analysis

On appeal the Weils raise many of the same issues presented to the two district courts. We endorse as our own the rulings of the two district courts on all of those issues. In addition the Weils raise an issue not presented to the trail courts, specifically the question of notice, contending that OPSB failed to

provide adequate notice of Kimberly's impending transfer from Cooley to Kiroli. We address that issue.

We do not find in this record an adequate explanation for the abrupt change from Cooley to Kiroli. We are informed only that the termination was for reasons beyond the control of OPSB. The Weils first became aware of this development when they heard a news report on television. Upon calling OPSB they were informed that Kimberly would be transferred from Cooley to Kiroli. There was no prior written notice before this was effected.

Both pertinent federal law and regulations require the public agency to notify the parents of a proposed change in the "educational placement" of their child. Hendrick Hudson Dist. Bd. of Educ. v. Rowley 458 U.S. 176, 182, 102 S.Ct. 3034, 3038, 73 L.Ed.2d 690, 697 (1982); Jackson v. Franklin County School

Bd., 806 F.2d 623 (5th Cir. 1986); 20 U.S.C. Sec. 1415(b)(1)(C); La. R.S. 17:1952(B) (West 1982);

La.R.S. 17:1952 provides:

> Safeguards to guarantee the rights of parents and exceptional children shall include the following: ... (3) Written prior notice to parents or guardians whenever a school district: (a) proposes to initiate or change ... the identification, evaluation, or educational placement of the child...

34 C.F.R. Sec. 300.504 (1990).

34 C.F.R. Sec. 300.504 provides:

> Written notice... must be given to the parents ... a reasonable time before the public agency: (1) proposed to initiate or change the identification, evaluation, or educational placement of the child...

We are not persuaded that the cited notice provisions were mandated in the instance of Kimberly's transfer from Cooley to Kiroli because that transfer did not constitute a change in "educational placement" within the meaning of 20 U.S.C. Sec. 1415(b)(1)(C).

The programs at both schools were under OPSB supevision, both provided substantially similar classes, and both implemented the same IEP for Kimberly. We conclude that the change of schools under the circumstances presented in this case was not a change in "educational placement" under section 1415. Concerned Parents & Citizens for Continuing Educ. at Malcolm X (PS 79) v. New York City Bd. of Educ., 629 F.2d 751, 754 (2d Cir. 1980), Cert. denied, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981) (holding that a transfer from one school to another school within same school district with similar but less "innovative" programs was not a change in educational placement within the meaning of 20 U.S.C. Sec. 1415 as the transfers did not affect the "general educational program in which a child ... is enrolled"); Christopher P. v. Marcus 915 F.2d 794, 796 n. 1 (2d Cir. 1990), Cert.

denied, ---- U.S. ----, 111 S.Ct. 1081, 112 L.Ed.2d 1186 (1991) ("The regulations implementing the Act interpret the term 'placement' to mean only the child's general program of education."); Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577, 1582 (D.C. Cir. 1984) (noting that one "must identify, at a minimum, a fundamental change in, or elimination of a basic element of the education program in order for the change [in schools] to qualify as a change in educational placement"); Tilton v. Jefferson County Bd. of Educ., 705 F.2d 800, 804 (6th Cir. 1983), Cert. denied, 465 U.S. 1006, 104 S.Ct. 998, 79 L.Ed.2d 231 (1984) (transfer from one school to another school with comparable program is not a change in educational placement). Therefore, we hold that OPSB was not required to provide the Weils with prior notice of Kimberly's transfer under the particular facts of this case.

Even if the transfer from Cooley to Kiroli were deemed a change in "educational placement" sufficient to invoke the EHA's prior written notice requirement, we hold that OPSB's failure to give this notice in the instant case was not actionable. The purpose of prior notice in the context of a proposed changed in educational placement is to inform the parents timely of the proposed change and of their right to request a hearing thereon. 20 U.S.C. Sec. 1415(b)(1)(C) & (b)(2); 34 C.F.R. Sec. 300.505(a)(1), Sec. 300.506(a). If the parents request a hearing, "the child shall remain in the then current educational placement of such child" unless the parents and public agency agree otherwise. 20 U.S.C. Sec. 1415(e)(3). However, if the change in "educational placement" is necessitated by the closure of a facility for reasons beyond the control of the public agency, the

"stayput" provisions of section 1415(e)(3) do not apply. Tilton, 705 F.2d at 804 (section 1415 stay-put provision not applicable when school is closed for budgetary reaons); Knight v. District of Columbia, 877 F.2d 1025, 1028 (D.C. Cir. 1989) (section 1415 stay-put provision not applicable if student's "then current educational placement" becomes unavailable and public agency provides student with similar placement pending administrative review process).

As noted above, OPSB apparently was forced to make an abrupt termination of its program at Cooley for reasons beyond its control. Therefore, even if OPSB had sent the Weils prior written notice and the Weils had requested a hearing, nothing substantive could have resulted. Kimberly could not have remained at Cooley. The most that could have occurred would have been a discussion about the transfer's impact on Kimberly's

IEP, a discussion which had to take place within 45 days of the request for a hearing. 34 C.F.R. Sec. 300.512(a). In view of the fact that OPSB officials scheduled a meeting with the Weils within a few weeks after Kimberly's transfer to Kiroli, it is apparent that any injury to the Weils was de minimus and thus damnum absque injuria.

We caution that today's ruling is entirely mandated by the facts of this case and is not to be taken as an invitation or condonation of a failure of public officials to comply with the procedural safeguards prescribed by the EHA and resultant federal and state regulations.

The judgments appealed are AFFIRMED.

APPENDIX F

ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT XI

Suits Against States

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

20 U.S.C. 1414(a)(5)

"The state agency should provide assurances that the local educational agency ... will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year ...".

20 U.S.C. 1415(a)

"Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units."

20 U.S.C. 1415(b)(1)(C)

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provisions of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate eudcational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents of guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

20 U.S.C. 1415(e)(4)...

"A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount of controversy.

B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part ofthe costs to the parents or guardian of a child or youth with a disability who is the prevailing party."

Louisiana Revised Statute 17:1947

A. Subject to the conditions and limitations of this Chapter, parish school boards, city school boards, and special school districts shall provide the following for exceptional children aged three through twenty-one: 1) special education and related services, personnel and programs; 2) alternative educational settings; 3) appropriate materials and supplies, equipment, and other media necessary for the provision of special education and related services; 4) individualized education plans; 5) procedural safeguards; 6) evaluation and reevaluation; 7) annual application reports; 8) parent participation; and 9) protection in evaluation.

B. Special education or related services may be provided by city or parish school boards and the special school districts for children under three years of age who have serious handicapping conditions which, if untreated, could become greatly compounded by school age.

C. Only persons who hold a vailed degree or certificate or have had such special training as may be required by the Department of Education, with the approval of its governing authority, shall be employed as director, coordinator, supervisor, therapist, teacher, aide, or other positions which may be established.

D. Whenever adequate education results can best be obtained by providing cooperative special education and related services, the parish and city school boards and special school districts shall establish and maintain such facilities

and programs according to procedures established by the Department of Education with the approval of its governing authority. Adjacent and nearby parish and city school boards and special school districts shall pool their resources for this purpose. The parish or city school board within whose boundaries said facility is located shall be designated as the coordinating fiscal agency.

E. Parish and city school boards and the special school districts shall provide whatever transportation is necessary to implement any exceptional child's individual education plan. Transportation shall be provided in cooperative programs according to the method established in the contract between the cooperating agencies or districts and shall also be in accordance with the child's individual education plan.

F. Architectural barriers shall not prevent an exceptional child from being educated in the least restrictive environment. No new school construction project shall be approved unless and until the Department of Education, with the approval of its governing authority, is satisfied that adequate provisions have been taken for children in need of special education and related services. Any new school construction projects shall conform to federal and state laws in regard to accessibility to handicapped persons.

G. City and parish schools boards shall employ a director of special education on a full or part time basis, according to procedures established by the Department of Education, with the approval of its governing authority.

Regulations

34 Code of Federal Regulations 300.4

Section 300.4 - Free appropriate public education

As used in this part, the term "Free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction and without charge.

(b) Meet the standard of the state education agency including the requirements of this part.

(c) Include pre-school, elementary school, or secondary school in the state involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Section 300.340 - 300.349 of subpart C.

34 Code of Federal Regulations 300.342

Section 300.342 - when individualized education programs must be in effect

(a) On October 1, 1977 and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related service are provided to a child; and

(2) Be implemented as soon as possible following the meetings under Section 300.343.

34 Code of Federal Regulations 300.504

Sec. 300.504 Prior notice; parent consent

(a) Notice. Written notice which meets the requirements under Sec. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or education placement of the child or the provision of a free appropriate public education to the child.

(b) Consent. (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) Procedures where parent refuses consent. (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2) (i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in Sec. 300.506 - 300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under Sec. 300.510 - 300.513.

Louisiana Regulations Section 441

A. Each completed IEP shall contain the following:

1. A description of current educational performance and levels of individual functioning.

2. A description of special education and related service needs.

3. Long-term educational goals and description of the educational program, indicating whether the child shall address the regular or separate minimum competencies or a combination of regular and separate minimum competencies.

4. Annual educational performance goals for the child.

5. The child's short-term objectives which are measurable intermediate steps to attaining goals.

6. Appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis whether the short-term objectives and annual goals are being achieved.

7. The type of physical education program to be provided as indicated in Sec. 448.A.9.

B. Each placement portion of the IEP shall include all of the following:

1. A description of the specific educational environment in which the child is to be placed for the

reasons that it is the least restrictive environment possible.

2. The extent to which the child will be able to participate in regular educational programs.

3. The date of initiation of each type of service and the anticipated duration of each. When a related service is included, the frequency (range of time per session and the number of sessions per week) and whether the service will be individual or group shall be indicated.

4. The identification of those types of persons/ agencies responsible for the implementation of the IEP/Placement.

C. The IEP shall be developed on the form issued by the Department.

D. The school system shall provide a copy of each completed IEP/Placement document to the child's parent(s).

Louisiana Regulations Section 448

Least Restrictive Environment Rules (Rules for selection of alternative settings)

A. For each educational placement, the school system shall ensure that:

1. It is determined at least annually.

2. It is based on an IEP/ Placement Document.

3. To the maximal extent appropriate, exceptional children are educated with children who are not exceptional.

4. Special class, separate schooling, or other removal of exceptional children from the regular educational environment occurs only when the nature or severity of the exceptionally, e.g., low incidence sensory handicapping conditions, is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

5. The placement is in the school which the child would attend if not exceptional, unless the IEP/Placement document require some other arrangement.

6. The placement is as close as possible to the child's home, if the placement is not in the school the child would normally attend.

7. In selecting an alternative setting, the school system shall consider any potential harmful effect on the exceptional child or the quality of services needed. No child shall be placed in a setting which violates the maximal pupil/teacher ratio or the three-year chronological age span.

8. The special education program in which each educational placement is made, including day

or residential nonpublic schools, meets the standards of the State Board.

9. Physical education services (including modification in regular physical education) must be provided to handicapped children in the regular physical education program and may be different from that provided other children only if the child needs adapted physical education according to criteria established in Bulletin 1508.

... D. The Least Restrictive Environment rules may not be waived by any party, including the parent(s).

Louisiana Regulations Section 451

Direct Service Rules

A. School systems must provide direct services themselves or through approved cooperatives in the alternative setting needed by an exceptional child if:

1. There are sufficient numbers of such exceptional children who need similar alternative special educational settings, who are within a three-year chronological age span, and who are under the jurisdiction of the school system.

2. Such direct services are consistent with these Regulations which have given particular attention to LRE Rules.

B. Exceptional children for whom a regular classroom placement (with supportive aids and services) is the LRE must be placed in such a classroom at the regular public school where the supportive aids and services would normally be provided.

C. Exceptional children who are voluntarily enrolled in an approved nonpublic school and who are selected at the option of the school system to be provided special educational services under an eligible enrollment shall be enrolled in the regular school program for the balance of the school day at the approved nonpublic school.

Louisiana Regulations Section 502

Full and Effective Notice

Full and effective notice is written notice that fulfills the following criteria:

A. Contains a full explanation of all the procedural safeguards available to the parents, including confidentiality requirements.

B. Describes the proposed (or refused) action, explains the reasons for such action, and describes any options considered and rejected.

C. Describes each evaluation procedure, type of test, record, or report used as a basis for the action and any other relevant factors.

D. Identifies the employee or employees of the school system who may be contacted.

E. Is written in language understandable to the general public and provided in the native language or other mode of communication used by the parent.

F. Is also communicated orally (when necessary) in the native language or other mode of communication so that the parent understands the content of the notice.

Louisiana Regulations Section 505

Section 505 reads in pertinent part:

Rights of Exceptional Children

Exceptional children (and their parents acting on their behalf) have the following rights:

... (L) To receive full and effective notice of proprosed actions as provided in this Part.

Louisiana Regulations Section 509

Initiation of Hearings

A. A school system or a part of an exceptional child or a child suspected of being an exceptional child may initiate a hearing whenever a school system:

1. Proposes to initiate or change the identificatio, evaluation, or educational placement of the child or the provision of a free, appropriate public education to the child.

2. Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

B. A school system initiates a hearing by providing full and effective notice of its intent to initiate a hearing to the parent and to any affected public or nonpublic school personnel. Full and effective notice of a hearing shall include all of the following:

1. A statement of the date, time, place, and nature of the hearing;

2. A statement of legal authority and jurisdiction under which the hearing is to be held;

3. A reference to the particular sections of the statutes or regulations over which the dispute originated; and

4. A short and clear statement of matters asserted.

C. A parent initiates a hearing by sending a written request to the parish supervisor.

D. A school system shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

1. The parent requests the information.

2. The parent or the school system initiates a hearing under this Section.

(2)

No. 91-347

In The

Supreme Court of the United States

October Term, 1991

DONNIE WEIL and KIM WEIL, Individually, and on Behalf of their Minor Daughter, DAY WEIL,

Petitioners,

vs.

THE BOARD OF ELEMENTARY AND SECONDARY EDUCATION and THE OUACHITA PARISH SCHOOL BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT OUACHITA PARISH SCHOOL BOARD

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TABLE OF CONTENTS

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Page

Contents

Statutes Cited:

Contents

I. STATEMENT OF THE CASE

A. PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

This lawsuit began with a due process hearing before a hearing officer certified by the State Board of Elementary and Secondary Education. That hearing was held on January 21 and 22, 1987. At that time, the parties were Mr. and Mrs. Weil and the Ouachita Parish School Board. The Board of Elementary and Secondary Education ("B.E.S.E.") was not a party and there were no claims made with respect to B.E.S.E.'s function any time prior to suit. The hearing officer rendered an opinion in favor of the Weils as to past reimbursement and in favor of the School Board as to future placement. The School Board appealed, to an administrative review panel of three persons qualified by B.E.S.E. This review panel reversed the finding of the hearing officer, as being

predicated upon errors of law insofar as it was against the School Board. The Weils appealed the hearing officer's decision denying future private placement, which the review panel affirmed.

Thereafter, the Weils filed suit against the School Board in the U. S. District Court for the Middle District of Louisiana, seeking relief from the administrative decision. In this action, the Weils also named B.E.S.E., for the first time asserting claims that B.E.S.E.'s review panel procedure denied due process of law. (No. 87-472, Section A, U.S.D.C., M.D. La.) (R.p. 2, et seq.)

Both defendants filed Motions to Dismiss in that court. (R.pp. 24 et seq., 31 et seq.) In addition, the School Board filed a motion to transfer the case to the Western District of Louisiana, Monroe Division, where it is domiciled, as are

the Weils. (R.p. 24, et seq.)

The U. S. District Court for the Middle District of Louisiana granted B.E.S.E.'s motion to dismiss, on Eleventh Amendment grounds. It then granted the School Board's motion to change the venue, and pretermitted ruling on the School Board's other motions. (R.pp. 37-41).

An appeal by the Weils of the dismissal of B.E.S.E. was dismissed by the Fifth Circuit as premature. (R.pp. 42-55).

The U. S. District Court for the Western District of Louisiana denied the School Board's pretermitted motions to dismiss. (R.pp. 65-69). The case was tried and a written opinion was issued on May 16, 1990, in favor of the School Board. (R.pp. 178-194). Judgment was signed on June 3, 1990. (R.p. 195). No post-trial motions were filed.

The Weils filed an appeal, seeking review both of the decision to dismiss B.E.S.E. and of the judgment on the merits as to the School Board. (R.pp. 197-198). The Fifth Circuit affirmed in all respects. The Weils petitioned this Court for a Writ of Certiorari.

B. STATEMENT OF FACTS

1. In General

The brief of the Weils does not contain a distinct statement of facts. Therefore, we include the following, which is in significant part drawn from the District Court's Memorandum Ruling.

The Plaintiffs are the parents of Kimberly Day Weil, called "Day," born on October 3, 1976. Day is severely or profoundly mentally retarded and cannot speak. She uses combinations of formal and informal signs, gestures and actions to communicate, with some use of

communication boards in more recent years. She has poor fine motor and gross motor skills. Although her level of motor function is a relative strength for her, because it is significantly greater than her level of intellectual or cognitive function.

Day has a seizure disorder along with behavioral problems, at times biting, pinching, pulling hair and refusing to cooperate. Her behavior has long been considered a serious problem by her educators and therapists. Her most significant educational needs are in the areas of self-help skills and communication.[1]

This litigation is focused on Day's placement at Kiroli Elementary School from

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1. The general facts in these two paragraphs are drawn from the District Court's opinion and are not disputed by the parties. They are supported by a great deal of evidence which permeates the transcript and exhibits, which cannot be cited without becoming cumbersome.

the fall of 1985 until February of 1986. Prior to that time, Day had been in a variety of educational environments, a summary of which is useful in understanding this case.

Day was recognized to be mentally retarded and developmentally delayed when she was nine months old. When she was two, she was enrolled in the Strauss Rehabilitation Center, in Monroe. She lived at home. She also received private speech therapy. (TR. pp. 61-62).

About ten months later, in 1979, she was enrolled in a pre-school special education program at Sherrouse Elementary School, a public school in the Monroe City School System. She continued to receive some services at Strauss, as well as private speech therapy. The Weils were dissatisfied with Sherrouse. (TR. p. 62). They provoked, but then withdrew, due

process proceedings. (Joint Ex. 16 pp. 176-177). (TR. pp. 3-4)

In August of 1980, the Weils moved into Ouachita Parish outside of Monroe, and enrolled Day Crosley Elementary School. She remained there until February, 1981. They found the Crosley program satisfactory. (TR. pp. 63, 189) but, after consultation with Day's teachers, they transferred her to the Columbia State School (a public residential facility about twenty miles from Monroe), where she remained until February, 1983. (TR. p. 63). The Weils agree that the program at Columbia worked well. (TR. pp. 63, 188).

In February of 1983, the Weils enrolled Day in the Institute of Logopedics (the "I.O.L.") in Wichita, Kansas. At this time, Day was almost seven years old. The I.O.L. is a private

residential school specializing in dealing with severely handicapped children, with a particular emphasis on communication skills. (TR. pp. 134-135). In 1989, it had fewer than fifty students and a total staff of over three hundred employees. (TR. pp. 95; 127-128).

Day remained at I.O.L. until August of 1983, when she was withdrawn to be hospitalized because of difficulties with her seizure disorder. In October of 1983, after stabilization of the problem, she returned home to live and enrolled at Riser Elementary School. (Joint Ex. 16 p. 67) (TR. pp. 3-4). She remained there until January, 1984. (TR. pp. 63-64).

In January of 1984, Day was enrolled at the G. B. Cooley School, which is located in Ouachita Parish. She still lived at home. (TR. p. 64).

For clarity in the factual narrative,

it is important to correct a misstatement in Plaintiffs' brief to the Fifth Circuit. That brief refers to G. B. Cooley as a private school. It is not, as the record makes clear. It is a public facility which, until August of 1985, included, pursuant to intergovernmental agreements, day student special education programs for more severely handicapped students of the Parish School Board and Monroe City School Board. These programs were conducted by School System employees in large part. See: Testimony of Mr. Hoyt Lee, Assistant Superintendent of Schools, TR. pp. 208-209; testimony of Mrs. Evelyn Evans, TR. pp. 210, 219. In the Pretrial Order, it was an admitted fact that the program in which Day was enrolled at G. B. Cooley was a joint operation with the School Board. (R.p. 130). Mr. Weil testified that G. B. Cooley placement was through the School

Board. (TR. p. 65). (Joint Ex. 16, p. 89) (TR. pp. 3-4). The trial court found that the G. B. Cooley placement was a Parish School Board placement. (R. pp. 180-181, 184-185).

Day stayed full-time at G. B. Cooley - until August of 1984. At that point, she attended G. B. Cooley part-time and had a home study tutor as well. In December of 1984, she was withdrawn by her parents from G. B. Cooley, from then until April of 1985, was educated entirely at home. Her parents found this satisfactory, except that it did not socialize Day with other children. (TR. pp. 64-65).

In the spring of 1985, Day was again enrolled at G. B. Cooley. (TR. p. 65). Her teacher was Evelyn Evans, who is employed by the School Board and is acknowledged by the Weils to have been a

good teacher. (TR. pp. 72, 192).

In August of 1985, for reasons beyond the control of the School Board, the Parish School program at G. B. Cooley was terminated, on very short notice. (Pre-Trial Order Admitted Facts, R.p. 130). Day was therefore placed at Kiroli Elementary School, a regular elementary school, grades K-6, serving both handicapped and non-exceptional children.

On May 2, 1985, at the outset of the placement of Day at G. B. Cooley, an I.E.P. was done for Day and signed by both her parents and Parish School officials. (Joint Ex. 1; TR. p. 65) (TR. pp. 3-4). When Day began at Kiroli in August of 1985, the School Board continued to execute the May, 1985 I.E.P. An I.E.P. conference was scheduled for October 3, 1985, but was postponed at the request of the Weils. (R. p. 181). After further

conferences, a new I.E.P. was signed on November 7, 1985. It called for an evaluation of Day's need for occupational therapy and physical therapy. (Joint Ex. 2 and 3)(TR. pp. 3-4).

Those evaluations were performed, concluding that Day did not require these therapies to derive educational benefit from her school program. This conclusion derived from the fact that Day's limiting problems were her cognitive level, which was below her physical level of function, and her behavioral problems. (Joint Ex. 4; (TR. pp. 3-11) Def. Ex. 3; (TR. p. 8) (TR. pp. 240-241; 244-245; 249-250; 262-263; 267).

The Weils, by December 2 or 3, 1985, made a final determination to withdraw Day from Kiroli and send her again to the I.O.L. (TR. p. 74). They did not seek to have her I.E.P. revised, nor invoke their

due process rights prior to withdrawing her. (TR. pp. 75-76). They unilaterally withdrew her from Kiroli, enrolling her in I.O.L. in February of 1986, after failing to respond to the requests of Day's teacher that they meet to review Day's status and I.E.P. (Joint Ex. 8 and 16 at p. 234) (TR pp. 3-4).

2. **PHYSICAL FACILITIES AT KIROLI**

Mr. and Mrs. Weil have in part based their claim on the alleged inadequacy of the physical facilities at Kiroli. We therefore briefly address the facts relating to that assertion.

At Kiroli, Day's class (seven students, a teacher and two aides) (Joint Ex. 16, p. 525). (TR. pp. 3-4) was located in the school's cafeteria-auditorium for approximately one week. Then, for several weeks, it met in a temporary class building also used, at

other times, for band. For the remainder of the semester, the class met in one of Kiroli's temporary classroom buildings, reserved exclusively for its use. (Joint Ex. 16, pp. 526-528; pp. 925-926) (TR. pp. 3-4).

Day received individual speech therapy several times weekly at Kiroli. This required her to meet alone in a room with a speech therapist. This room, which Plaintiffs' brief refers to as a "closet," was five or six feet wide and ten feet long, with a window, a mirror and a table with two chairs for use by the therapist and the student. (TR. p. 76-77). Day was served by a certified special education teacher, two aides, certified speech therapists, and a certified adaptive physical education teacher. She also had consultation by a certified occupational therapist. There was no expert testimony

to indicate that the facilities or the personnel were unqualified or unsuitable.

Beginning in 1986, Kiroli and all other Parish Schools west of the Ouachita River were the subject of construction and renovation pursuant to a 29.5 million dollar bond issue. (TR. pp. 207-208). The Weils admit freely that they are unfamiliar with the facilities as they are since that time, and unfamiliar with the School System's personnel and programs at any time since January, 1986. (TR. pp. 98, 203). The School System has at all times had all of the qualified personnel to meet Day's needs. (TR. p. 205-207). We mention these facts only because the Weils pursued claims for the cost of future placement at I.O.L., even while admitting their ignorance of the locally available programs and admitting their unwillingness to even meet to

consider them. (TR. pp. 77; 98-100; 202).

3. DAY'S PROGRESS

Day is severely or profoundly mentally retarded and has other associated handicaps as well. She has never been able to speak verbal language She can make sounds and can understand spoken language to a degree.

When Day first went to I.O.L. in 1983, she could do no signing at all. She was seven years old., with a mental age of one year. (TR. p. 65-66). During the two preceding years, while at Columbia State School, Day had improved her self-help skills significantly. (TR. p. 66).[2]

In 1983, while enrolled at I.O.L., her fine motor skills were evaluated at the level of a 13-16 month old child. When she left I.O.L. in July, 1983, she

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2. "Self help skills" include such things as brushing teeth, eating, washing hands, undressing or dressing, toileting, and so on. (TR. p. 91).

had regressed to a 14 month level. (TR. pp. 68-69; Pl. Ex. 4, pp. 3-4). Her gross motor skills did not change measurably. (Def. Ex. 54 p. 4 "Motor" (TR. p. 8) and Pl. Ex. 4, pp. 5-6). (TR. p. 6).

By May of 1985, Day had a signing vocabulary of about five signs. (Pl. Ex. 11, p. 6). (TR. p. 6). Her ability to express herself was at the level of approximately a 14 month old, and her ability to comprehend speech or communications was approximately that of a two year old. (Pl. Ex. 11, p. 5). (TR. p. 6).

By the time Day left Kiroli and enrolled at I.O.L. in February, 1986, her expressive speech abilities had improved to the 17-20 month level. Her receptive speech ability had remained essentially unchanged since the previous May. I.O.L. reported her signing vocabulary to be

improved to about 20 words upon enrollment. (Joint Ex. 13, p. 28; (TR. p. 5). Pl. Ex. 25, p. 3). (TR. p. 6).

In early 1987, after a full year at I.O.L., Day's signing vocabulary remained at about 20 words. (Pl. Ex. 37, p. 4) (TR. p. 6). When she left I.O.L. in June of 1988, her vocabulary was still only 20 words. (Pl. Ex. 81; 93A p. 9; 93B p. 3). (TR. p. 6).

By February of 1989, at Columbia State School, she could sign 23 words. By June of 1989, Columbia reported her signing vocabulary to be 31 words. (Pl. Ex. 101, p. 5 and 94, p. 9). (TR. p. 6).

Her speech abilities, since 1987, have fluctuated around the level of a two year old for expressive speech and between two and three years for receptive speech. (See Joint Ex. 13, pp. 28-29). (TR. p. 5).

Day has had periods of progress, plateau and regression, regardless of her environment or educational program. This history is typical of severely retarded children and is to be expected when they are subjected to much change. (TR. pp. 139, 153-155; see Mr. Weil's testimony, TR. pp. 104-105; Joint Ex. 13, p. 29; Joint Ex. 12, pp. 22-24). (TR. p. 5).

Day did not achieve more than a fraction of the I.E.P. goals and objectives set for her, regardless of the time or educational placement. This is also not unusual for the severely handicapped, particularly when the time in a particular program is short. (TR. pp. 150-155).

We summarize these facts to give this Court context, and to illustrate that regardless of time, place or program, Day Weil's progress has been very slight and

not consistent; that her level of function is quite limited; and that her motor skills are rated as significantly superior to her intellectual skills.

4. DECISIONS OF THE COURTS BELOW

The findings of the District Court, adopted by the Fifth Circuit, are thorough, articulate and reasoned. They may be summarized as follows.

The District Court found that Day's I.E.P. of May 2, 1985, at G. B. Cooley, was formulated and agreed to by the Weils and Parish School officials. An I.E.P. conference was held October 3, 1985, but postponed at the request of the Weils. On November 7, 1985, a new I.E.P. was signed by School Board officials and the Weils. That I.E.P. called for evaluation for (not provision of) occupational and physical therapy.

The Court below concluded that no new

I.E.P. was required by law prior to providing services to Day at Kiroli. The May, 1985, I.E.P. remained valid. The School Board did not procedurally violate E.A.H.C.A., nor did it deny Day a free appropriate public education, to utilize the May, 1985 I.E.P. until November of 1985.

The District Court reviewed the procedural devices of E.A.H.C.A. and found that the Weils were accorded all of the procedural safeguards of the statute.

The District Court found that Day made progress at Kiroli, and was provided with "some educational benefit" there in the fall of 1985. It also found that the facilities at Kiroli were adequate. It found that, while occupational or physical therapy may have been helpful to Day, neither was necessary. The Court concluded that the absence of these

therapies did not deny Day a free appropriate public education, because she could and did gain educational benefit without them.

The Court found that Day's progress varied at times, as is normal, including regressions, and that changes in her environment had often inhibited her progress. It noted that her time at Kiroli was brief and she was given little time to adapt to Kiroli before the Weils withdrew her.

It said that while her progress might have been maximized by a facility like I.O.L., that this was not the requirement of E.A.H.C.A. Day, the Court concluded, was not deprived of a free appropriate public education at Kiroli. Further, the Court noted the absence of any proof that the School Board cannot now appropriately provide for Day.

The Fifth Circuit affirmed, adopting the District Court's opinion and additionally ruling, on an issue not raised prior to appeal. That the Weils were not deprived of proper notice, under the circumstances, of Day's change of location to Kiroli in August of 1985.

II. SUMMARY OF ARGUMENT

The burden of proof is upon the Weils to show that Day was denied a free appropriate public education at Kiroli in the fall of 1985; that she could not have received a free appropriate public education at any available public facility in Louisiana, warranting her removal to a private, out-of-state facility; and that the facility to which she was removed and the program in which she was placed were appropriate. In reviewing the District Court's finding that the Weils failed to meet that burden,

the District Court's factual conclusions must stand unless "clearly erroneous."

The District Court concluded that Day Weil's May 2, 1985 I.E.P. at the G. B. Cooley School was an I.E.P. confected between the Weils and the School Board and was available for implementation a few months later at Kiroli. It also concluded that any "delay" in revising that I.E.P., until the fall of 1985, was due to circumstances not within the control of the parties. These findings are supported by substantial evidence and are not "clearly erroneous."

The District Court and the Fifth Circuit concluded that the governing regulations do not require a new I.E.P. to be made prior to the start of each school year. Rather, they require that an I.E.P. be <u>in effect</u> at the beginning of each school year and that I.E.P.'s be reviewed

and, if necessary, revised at least once annually. Thus, the School Board properly utilized the new May 1985, I.E.P. a few months later, and properly revised it in the fall of 1985, less than six months later. The Weils' argument that the law requires a new I.E.P. every September, regardless of how recently the existing I.E.P. may have been confected, is legally unsound. The regulatory law clearly is to the contrary and the Courts below correctly so concluded.

E.A.H.C.A., as interpreted by the Courts, requires that an I.E.P. provide to the child a reasonable opportunity to derive some educational benefit, in accordance with the unique needs of that child. Support services, such as therapies, are required only to the extent they are necessary to enable the child to derive educational benefit.

The District Court concluded that the facilities and resources at Kiroli were adequate to allow Day a reasonable opportunity to derive educational benefit. It also concluded that she did, indeed, derive educational benefit from the Kiroli program and, to the extent it was not greater progress, a likely cause was that Day was not allowed to remain at Kiroli long enough to adapt to that environment. These conclusions are well supported by evidence and are not "clearly erroneous."

The District Court also concluded, with a great deal of expert and factual evidence to support it, that Day did not require occupational therapy or physical therapy to enable her to derive benefit from her educational program. The Court found that Day did actually benefit at Kiroli without them, as she had done in earlier placements without such therapies.

Thus, although such therapies might have been useful to Day, they were not mandated by E.A.H.C.A. The limiting factors in Day's educational progress were cognitive and behavioral. Although her muscular function was developmentally delayed, it was not the obstacle to further educational progress, in the opinion of the experts who testified and of the District Court. This conclusion is well grounded in the evidence.

E.A.H.C.A. does not require a program designed to maximize each child's potential. While an elite private program like I.O.L. may more nearly do that, that is not the mandate of E.A.H.C.A. Day could and did benefit in the Ouachita Parish public schools. Considering that the public schools provided a less restrictive environment, where Day lived at home and attended a school also

attended by non-exceptional children, the District Court's conclusion that E.A.H.C.A. was not offended is proper.

The procedural requirements of E.A.H.C.A. were met, as the District Court found. I.E.P.'s were confected and signed by the Weils. Although they were familiar with their right and the process to seek revision of an I.E.P., they elected not to pursue it. They unilaterally withdrew Day and provoked a full due process hearing, followed by an administrative appeal, all as provided by Federal law and State regulation. That process was followed by their institution of this litigation. They have surely had due process of law.

Plaintiffs interjected for the first time in argument before the Fifth Circuit an argument that the Weils were not properly given formal notice of the change from the G.B. Cooley site to the Kiroli

site. The School Board contends that this issue was not properly before the Court, as it had not been raised in the administrative process or in the District Court. Nevertheless, the Fifth Circuit did consider it -- and properly rejected the Weils position.

We do note that it was stipulated that the change of location occurred and was on short notice for reasons not attributable to the School Board. We also note that the Weils made no objection and agreed to and signed an I.E.P. at Kiroli, surely mooting this highly technical and afterthought objection. Their claim and their testimony is that they withdrew Day because of dissatisfaction with the terms and implementation of the November I.E.P. -- not because they were not formally notified of the site change. There was no evidence of objection to the site change,

no evidence that the site adversely affected Day -- indeed, it was a less restrictive environment. Further the Fifth Circuit correctly concluded that, under the facts presented here, there was no "change in educational placement" requiring formal notice; and that the alleged lack of notice was not actionable because it would have been impossible for Day to have stayed in her "then current educational placement."

We submit that the decisions of the Courts below are sound and supported by the evidence in the record. The opinions are clear, reasoned and correct.

III. ARGUMENT

A. OVERVIEW OF THE GOVERNING LAW

The Education for All Handicapped Children Act (E.A.H.C.A.), 20 U.S.C. § 1401, et seq., in general provides that in order for the States to qualify for

certain Federal funds, they must undertake the obligation to provide to all children of elementary and secondary school age, who are handicapped within the meaning of the Act, a free appropriate public education. This education must be provided pursuant to regulations adopted by the State and approved by the Secretary of Education, and pursuant to an Individualized Education Program (I.E.P.) devised through consultation among the child's parents and appropriate school personnel. It must provide for such "related services," as defined by the Act, as are necessary for the child to have the opportunity to derive some benefit from the education program. 20 U.S.C. § 1407-1415; Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed 2d 690 (1982).

The Louisiana regulations which are

approved under this Act are known as Bulletin 1706 of the Board of Elementary and Secondary Education. (Def. Ex. 1). (TR. p. 8)

Judicial review is de novo, but the administrative record is admitted and is entitled to some deference. 20 U.S.C. § 1415(e)(2); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983); Rowley, supra.

The burden of proof was upon the Weils to show that the education offered at Kiroli was not appropriate; that there is no other public facility which does offer an appropriate education for Day; and that the private placement for which they seek public funds is appropriate. Bales v. Clark, 523 F. Supp. 1366 (E.D. Va. 1981). It is rebuttably presumed that the placement and program envisioned by the child's I.E.P. provides an appropriate education. Honig v. Doe, 484 U.S. 305,

108 S.Ct. 592, 98 L.Ed. 2d 686 (1988); Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), aff'd 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1984).

Review by the District Court is de novo. It is not free to substitute its ideas of education for those of the school system. Once the Act's requirements are met, the means and methods of education are left to the State. Although judicial review is not limited to insuring compliance with procedural requirements, adequate compliance with these requirements will in most cases assure that the Congressional purposes are satisfied. If the State has complied reasonably with the procedural requirements, the Court must determine whether the I.E.P. is reasonably calculated to enable the child to receive some educational benefit. If so, then the

State has complied with the obligations imposed upon it under the Act, and the Court can require no more of it. Board of Education v. Rowley, supra.

Claims of non-compliance with E.A.H.C.A., either procedurally or substantively, are not actionable under any other law. E.A.H.C.A. is the exclusive remedy for matters within its scope. Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed. 2d 664 (1964); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Doe v. Koger, 710 F.2d 1209 (7th Cir. 1983). Only issues as to which administrative remedies have been invoked and exhausted may be the subject of judicial review under E.A.H.C.A. Riley v. Aubach, 668 F.2d 635 (2d Cir. 1981); Sessions v. Livingston Parish School Board, 501 F. Supp. 251 (M.D. La. 1980);

Daniel B. v. Wisconsin, 581 F. Supp. 585 (E.D. Wisc. 1984).

Precisely what constitutes a "free appropriate public education" pursuant to an "individual education program" is of necessity variable with the circumstances of the parties. However, parameters within which this standard may be judged have been established in the jurisprudence.

The obligation to provide a free appropriate public education does not require that the school system provide an ideal program, or a program which maximizes a child's potential. The law, rather, requires that a program meet the standards of the State's educational agency and be provided in conformity with the I.E.P. It is well established that this Act is satisfied when a school provides personalized instruction with

sufficient support services to permit the child to gain some benefit educationally from that instruction. The Act does not guarantee a certain level of education, or progress, but is merely designed to open the door to educational opportunity. Board of Education v. Rowley, supra; Cain v. Yukon Pubic Schools, 775 F.2d 15 (10th Cir. 1985); Bales v. Clark, 523 F. Supp. 1366 (E.D. Va. 1981).

An appropriate education requires that those services be provided which are required in order for the child to be enabled to derive some benefit from the educational program, in accordance with the unique needs of that child. Conversely, the term does not mean that a school system is required to provide any and all services which might be beneficial. Rettig v. Kent City School District, 539 F. Supp. 768 (N.D. Ohio

1981). E.A.H.C.A. does not require the State to furnish all therapy or other services which a child may need. Rather, it is required only to provide those services which are required to obtain benefit from special education. 20 U.S.C. § 1401 (17); 34 C.F.R. § 300.13 (1982); Tatro v. Texas, 625 F.2d 557, at 563 (5th Cir. 1980); Marvin H. v. Austin Independent School District, 714 F.2d 1348 (5th Cir. 1983), at 1354 n. 8.

Cost of the education and related services may properly be considered by the Court. A.W. v. Northwest R-1 School District, 813 F.2d 158 (8th Cir. 1987); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983). It is not relevant that a different placement or different program may be superior to that offered by the public schools. Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1984); Hessler v.

State, 700 F.2d 134 (4th Cir. 1983).

The Act also requires that the child's education be conducted, to the extent practicable, in the "least restrictive environment." This precept basically means that, where not inconsistent with providing educational benefit, the child's interaction with non-handicapped students and the child's residence or association with home and family is to be maximized. 20 U.S.C. § 1412(5)(B); Daniel R.R. v. State, 874 F.2d 1036 (5th Cir. 1989), at 1050.

B. STANDARD OF REVIEW

The District Court's factual determinations are subject to revision only if clearly erroneous. F.R.C.P. Rule 52(a). Thus, as to factual determinations, the question is not whether this Court would agree or disagree, but whether "on the entire

evidence [it] is left with the definite and firm conviction that a mistake has been committed." Zenith Corp. v. Hazeltine, 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed 2d 129 (1969).

In this case, it cannot be fairly said that the District Court's factual findings were clearly erroneous. Each is well supported by the record. To the extent that the Weils dispute them, on appeal, they must show that the District Court was clearly erroneous. This they fail to do.

In each respect, the record reveals ample evidentiary support for the District Court's findings, as is reflected above in the statement of facts and below in argument.

C. **FREE APPROPRIATE PUBLIC EDUCATION**

The Weils argue that the District Court erred in concluding that they had

failed to prove that Day had not gotten a free appropriate public education at Kiroli. They hinge this argument on three premises:

1. That the District Court erred as a matter of law in concluding that the School Board complied with E.A.H.C.A. when it began Day's enrollment at Kiroli under the May 2, 1985 I.E.P. done in the Board's G. B. Cooley program, rather than completing a new I.E.P. prior to enrolling Day at Kiroli. The Weils argue that this I.E.P. procedure alone denied Day a free appropriate public education and warranted her unilateral withdrawal to a private placement, at public expense.

2. That the District Court erred in concluding that, although not ideal, the physical facilities and materials at Kiroli were adequate to provide Day with a free appropriate public education.

3. That the District Court erred in concluding that, Day received educational benefit from her program at Kiroli, without an educational need for occupational therapy or physical therapy.

We submit that, in each respect, these arguments are without merit and demonstrate no basis for reversing the decision of the District Court.

1. The School Board Properly Relied on the May 2, 1985 I.E.P. at the Outset of Day's Enrollment at Kiroli

The District Court found that the May 2, 1985, I.E.P. was confected by the Weils and the School Board, although the placement was in the School Board's program at G. B. Cooley School, which the School Board did not own. G. B. Cooley was a public facility. That I.E.P. was agreed to by the Weils and its propriety for Day was never in dispute.

There is no requirement in the law or in the regulations that a new I.E.P. be confected at the start of each school year. Quite the contrary, a new I.E.P. is required only once annually. Even the Weils' brief correctly states that an I.E.P. shall simply be in effect at the start of the year.

20 U.S.C. § 1414(a)(5) states, in pertinent part, that:

> A local educational agency...shall provide assurances that [it]...will establish or revise...an individual education program...at the beginning of each school year and will then review...its provisions - not less than annually.

34 C.F.R. § 300.342(a) provides that an I.E.P. shall be in effect at the beginning of the school year -- not that a new I.E.P. be done if there is already one still in effect.

34 C.F.R. § 300.343 states, in part,

that:

> ...the statute requires agencies to hold a meeting at least once a year in order to review, and if appropriate revise, each child's I.E.P. The timing of those meetings could be on the anniversary date of the last I.E.P. meeting on the child, but this is leftto the discretion of the agency.

At 34 C.F.R., Part 300, Appendix C, there is an interpretation given of these requirements in response to the specific question presented here. It states:

> II. I.E.P. Requirements...
>
> 9. Must I.E.P.s be reviewed or revised at the beginning of each school year...
>
> No. The basic requirement...is that I.E.P's must be <u>in effect</u> at the beginning of each school year. Meetings must be conducted at least once each year to review and, if necessary, revise.... However, the meetings may be held at any timeduring the year....

34 C.F.R., Part 300, Appendix C, demonstrates that even a change of setting does not require a new I.E.P., if the

current I.E.P. can be implemented.

The School Board and the Weils created a new I.E.P. for Day on May 2, 1985. The location at which that I.E.P. would be effected changed at the end of August, 1985, but that I.E.P. remained in effect and available for implementation. Within a reasonable time under the circumstances, as the District Court found, the I.E.P. was revised. We note that the change of setting was to a less restrictive environment, since Day was previously at a site which educated only handicapped children, while Kiroli gave her exposure to the non-exceptional children at the school.

The I.E.P. of May 2 was deemed appropriate by the Weils and that is not contested here. The District Court did not err in concluding that, under the circumstances, it was permissible, lawful

and reasonable to begin Day's enrollment at Kiroli by continuing to implement that same I.E.P., which was only four months old at the time.

The argument by the Weils that the failure to do a new I.E.P. at the end of August warranted Day's unilateral withdrawal in February is specious. Months before the withdrawal, a new I.E.P. had been formulated and signed by Mr. and Mrs. Weil. By the time of withdrawal, the previous reliance on the May 2, 1985 I.E.P. for sixty days or so had become moot. It is not logical to argue that the Weils were justified in withdrawing Day for a reason that did not exist at the time and had not existed for months. Such an assertion would certainly not support any claim for extended future private placement.

2. The Trial Court Did Not Err in Concluding that the Physical

Facilities at Kiroli Did Not Deny Day a Free Appropriate Public Education

The District Court concluded that the physical facilities at Kiroli, were adequate to provide an appropriate education to Day under the circumstances. There was no evidence that the use of a temporary classroom building was detrimental to Day or prevented her from receiving benefit from her education. There was no evidence, nor even a claim, that the classroom was defective in any way.

There is no evidence that having Day's class meet for a couple of weeks in other rooms, while a permanent class was readied, prevented Day from gaining benefit from her educational program.

Plaintiffs have presented no evidence at all, from any expert person, to suggest that the physical facilities at Kiroli Elementary School were inadequate to

provide Day with a reasonable opportunity to derive benefit from her educational program. Plaintiffs' evidence consisted of the Weils' own dissatisfaction with the physical situation for a few weeks.

The class met in the cafeteria-auditorium for three or four days (Joint Ex. 16, p. 589) (TR. pp. 3-4). It then met in a building also utilized as the band room after school, for less than two weeks, while a new T-building was readied for the exclusive use of this class. (Joint Ex. 16, p. 591) (TR. pp. 3-4). The class had only a few children, with a teacher and two aides. Part of each day, Day got adaptive P.E. Part of each day, she was with her speech therapist. Each of these related services took place apart from the classroom.

Speech therapy was conducted in a small room -- but there were only two

people there, Day and her therapist, sitting at a table and chairs for less than one hour. There is no evidence that the size of the room adversely impacted the benefit of Day's speech therapy.

It is impossible to conclude that the District Court's factual conclusions with respect to the physical facilities are "clearly erroneous." On the contrary, the Weils' claim, to the extent based upon this factor, is unsupported.

3. Day Weil Did Not Require Direct Physical Therapy or Occupational Therapy to Derive Benefit from Her Education Program

The Weils argue that the decision of the School Board that Day did not require direct physical and occupational therapy denied her a free appropriate public education, because she could have gotten benefit from those therapies. In this respect, the Weils' position fails to make

clear a critical distinction of overriding legal significance. It also relies upon a misstatement of the import of the testimony of Patricia Navarro Shoudy at the trial.

The Weils argue, in sum, that Day had limitations of her motor skills; that physical and occupational therapy might help in those areas; and that therefore denial of those therapies constitutes denial of an appropriate education. This assertion is incorrect.

As we have noted above, the law requires that related services, such as occupational or physical therapy, be provided only if the child is, in their absence, not capable of deriving benefit from her educational program. The Weils have stated the matter conversely from the law, arguing that Day could benefit from the therapies, not that she was unable to

benefit without them.

In so arguing, the Weils' brief misstates the testimony of Patricia Shoudy, the occupational therapist who evaluated Day and consulted with Day's teacher at Kiroli, by presenting a small portion of it taken grossly out of context.

In the cited passage, Ms. Shoudy testifies that Day Weil could have benefited from occupational therapy. Ms. Shoudy's testimony, at TR. pp. 227-276, taken as a whole, clearly states that, while Day may have been able to benefit in a therapeutic sense from occupational therapy, she did not need occupational therapy in order to gain benefit from her educational program. She further testified that, under regulatory provisions designed to determine who, educationally, needed such therapy, Day

did not need it in 1985. This conclusion is explicit from her testimony, and the extracted references cited in the Weils' brief are patently misleading.

We observe for the Court's benefit the following parts of Ms. Shoudy's evidence:

> In the educational setting, we are set there for children who need our services to benefit from the educational setting, and it's strictly educational. It's not a medicaloriented frame of reference. (TR. p. 229).

Immediately following the testimony quoted by the Weils' brief, Ms. Shoudy continued, saying:

> My concept of benefit does not mean that they have to have that to be able to be educated. I can benefit from a lot of things, but I don't have to have them every day to be able to do what I need to do.
>
> * * *
>
> No, I think that you have to, there is a lot of children that at one point in time they could benefit from O.T., okay? There

is another group of children out there who need O.T. to be able to benefit from an education setting. There is a difference.

THE COURT: So you are saying that some need O.T.?

THE WITNESS: Some children can't sit in their chair, okay?

THE COURT: They must have it.

THE WITNESS: They have to have O.T.

THE COURT: But some of us who can, for instance, sit in the chair, might well benefit from O.T.?

THE WITNESS: Yeah, they can benefit. I mean.

THE COURT: Why wouldn't you give it to them if they could benefit?

THE WITNESS: Because if we did that we would be serving every single child in the United States with every single qualified person you could get.

(TR. pp. 249-250).

Ms. Shoudy later explained:

Day did not have muscular incoordination so much that she could not pick up and put a sandwich in her mouth, okay. It

was my professional opinion, it was the teacher's professional opinion that at that time it was not a fine motor problem, it was a cognition, an attention problem, and a behavior problem.

(TR. pp. 262-263).

Q. You testified on cross-examination that occupational therapy could have helped Day. My question to you is did she need occupational therapy in order to gain educational benefit or to learn?

A. I don't believe so at that time. ***.

(TR. p. 275).

Ms. Shoudy explained that the basis in regulatory provisions and in the educational context for her conclusions was that the developmental level of Day's motor skills was superior to the developmental level of her cognitive skills, by more than a full year's developmental age. Thus, Day's primary limiting problem was her cognitive skills, not her motor skills. (See TR. p. 230; pp. 242-245; pp. 252-255). This

limitation was compounded by her behavioral problems and lack of attention span, which are not addressed by occupational therapy. (TR. p. 268).

The import of this evidence is that, in order for a child to require a therapy of this sort to enable them to benefit educationally, their physical limitations must be a barrier to learning things which they are cognitively and behaviorally capable of learning. The physical handicap must rise to the level of an educational barrier. The evidence in this case, for Day Weil in 1985, is that it did not.

Indeed, Day's motor skills have generally been recognized to be a relative strength for her during that time of her life. I.O.L.'s records in February of 1986 record Day's size, strength and muscle tone to be normal. They reported

her gait, station and posture to be normal and that she had a relative strength in her functional use of fine motor skills. (TR. pp. 80-81). (Pl. Ex. 24, pp. 9-10 in the Neurological Exam Report, p. 19 in the Education Evaluation Report). (TR. p. 6).

Mr. Weil admitted that Day was capable of deriving benefit from the educational setting without those therapies. (TR. pp. 96-97).

Plaintiffs offered no evidence to contradict this. No expert testified that Day could not derive benefit from her educational setting in 1985 without direct physical and occupational therapy. Plaintiffs' evidence was simply that Day, they believed, would gain something further, or faster, if she did have the therapies -- but that is not what the law requires. (Testimony of Mr. Weil, TR. pp.

96-97).

The School Board did provide indirect therapy to Day. Ms. Shoudy worked with Day to devise splints to help her work with crayons and she consulted with her teacher to give suggestions and guidance for work with Day's motor skills. (TR. pp. 235-238; 260). Day got adaptive physical education, which is similar to the work of the therapists. (TR. p. 239-240). Even I.O.L. provided therapy often in these "consultative" (as opposed to direct) modes, and recognized that there was nothing unusual about that. (TR. p. 143).

We also note that Day did progress, in her very brief time at Kiroli, in her physical skills. Even Mr. Weil conceded that this might be so. Her behavior improved, she made some progress in drinking from a cup, on rolling and

playing with balls, on responsiveness to directions and commands. (TR. p. 79).

Despite the testimony of the Weils to the contrary, it is evident that Day's signing also improved. As noted above, the Weils agree that Day could form only a few signs when she began at Kiroli. (Supra, pp. __-__). Although the Weils do not agree, the records of I.O.L., upon Day's transfer out of Kiroli in February of 1986, show that I.O.L. evaluated Day's signing capacities to have improved to twenty words. (Joint Ex. 13, p. 28).

Certainly the record contains more than sufficient evidence to support the District Court's conclusions that Day could and did progress in her educational program at Kiroli without direct occupational or physical therapy. Thus, the District Court's findings are not clearly erroneous and constitute no basis

for review.

4. Additional Considerations

We additionally observe that the placement at Kiroli was a far less restrictive environment than that at I.O.L. I.O.L. is a residential school hundreds of miles from Day's home, serving only severely handicapped students, where Day lived year round except for brief home visits. Kiroli is a day school serving both handicapped and non-exceptional students, so that Day could live at home with her family, associate with non-exceptional children, and in general live in a less restrictive environment. Even the Weils and their witnesses agreed that Day could live at home and be educated in a day school setting. (TR. pp. 96; 137-138; 196; 202-203). This factor, we submit, lends additional support to the District

Court's conclusion that her education at Kiroli was appropriate.

Also, the Weils have failed to prove that the proposed placement at I.O.L. was appropriate. They have not shown that I.O.L. is a facility approved by the State of Louisiana, which is required by law. (Def. Ex. 1, Bulletin 1706, 104, 452(B)(2)). (TR. p. 8) They have acknowledged that Day does not require a residential placement. They have acknowledged that I.O.L. is an elite school, whose programs have as their intent to achieve the best for each child. (TR. pp. 95; 187; 134-135). While surely laudable and desirable, this is not what the statute requires at public expense.

5. Notice of Transfer to Kiroli

As the Fifth Circuit noted, this issue was not raised prior to appeal. Therefore it should not have been

considered by the Fifth Circuit and should not be considered by this Court.

If it is considered, we submit that the issue should be deemed to be moot. After the transfer to Kiroli, the Weils agreed to a new I.E.P. They freely admitted at trial that they were fully conversant with all of their procedural rights under E.A.H.C.A. They withdrew Day and instituted this proceeding, not because Day was transferred to Kiroli or because they did not receive notice of it, but because they were dissatisfied with the November 7, 1985 I.E.P. and its implementation. This issue is a mere afterthought, never mentioned before the District Court's decision adverse to the Weils. It is not properly an issue in this case.

Even if it is, the issue was correctly resolved by the Fifth Circuit.

There was no "change in educational placement" here. Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Ed. 629 F.2d 751, 754 (2d Cir. 1980), cert. den. 449 U.S. 1078, 101 S. Ct. 858, 66 L.Ed.2d 801 (1981); Christopher P. v. Marcus, 915 F.2d 794, 796 n.1 (2d Cir. 1990), cert. den. __ U.S. __, 111 S.Ct. 1081, 112 L.Ed.2d 1186 (1991); Tilton v. Jefferson County Bd. of Ed., 705 F.2d 800, 804 (6th Cir. 1983), cert. den. 465 U.S. 1006, 104 S.Ct. 998, 79 L.Ed.2d 231 (1984).

Even if this had been a "change in educational placement," there was no violation. Because the facility at G.B. Cooley was no longer available, the location of Day's education had to change, regardless of notice. I.E.P. conferences were held and a new I.E.P. agreed to at

Kiroli. "Notice" would have effected no other result.

The Fifth Circuit, if it was correct in treating this issue at all, correctly resolved it.

IV. CONCLUSION

The District Court's and Fifth Circuit's decisions should be affirmed. They are founded upon correctly stated and applied principles of law and upon factual conclusions which are amply supported by the evidence and cannot be said to be clearly erroneous.

This case involves circumstances for the Weil family which are most difficult and which cannot fail to invite natural human sympathies. Day is severely handicapped. Her parents naturally want to do all that can be done for her, in the best way that it can be done. It is our humane response to have similar

inclinations. That is good, but that is not what is the issue in this litigation. To wish to provide the maximum effort to help Day is human, but it is not what the law requires of the School Board at public expense. This case is concerned with what is mandated by law, and whether the District Court clearly erred in concluding that the Weils failed to prove that the mandates of law were not satisfied.

We have not addressed the merits of the claims against B.E.S.E. Those claims are mooted by the decision that Day received a free appropriate public education. Even if not mooted, they are distinct and their outcome should not impair the validity of the decision with respect to the School Board.

The statements in the Petition for Certiorari that any child but Day Weil

would have won in this case are hyperbole. There is nothing unusual about a Court limiting its opinion to the facts before it, and that does not imply that the party against whom that decision was resolved was discriminated against or singled out. It merely means that the facts of the case are unusual and that therefore one should be cautious in deriving principles of broad application from the decision.

The decisions below are thoroughly supported by the evidence and well grounded in the law. There is no occasion here for review by this Court. Certiorari should be denied.

Respectfully Submitted,

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